United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

FOR MR. JUSTICE McCOMAS.

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

OCTOBER TERM, 1906.

No. 1715.

453

JANE O'DWYER, APPELLANT,

vs.

NORTHERN MARKET COMPANY AND THE DISTRICT OF COLUMBIA.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED AUGUST 9, 1906.

Argued Mar 8th 1907

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COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 19, 1906.

In the Court of Appeals of the District of Columbia.

No. 1715.

JANE O'DWYER, Appellant,
vs.
NORTHERN MARKET COMPANY ET AL.

a Supreme Court of the District of Columbia.

No. 45216. At Law.

JANE O'DWYER, Plaintiff,
vs.
NORTHERN MARKET COMPANY and THE DISTRICT OF COLUMBIA, Defendants.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause to wit:—

1 *Declaration.*

Filed February 1, 1902.

In the Supreme Court of the District of Columbia.

Law. No. 45216.

JANE O'DWYER, Plaintiff,
vs.
NORTHERN MARKET CO., THE DISTRICT OF COLUMBIA, Defendants.

The plaintiff sues the defendants, The Northern Market Company, a corporation, engaged in the operation and maintenance of a certain market, situated on 7th. street, between O and P streets, N. W., in the city of Washington, District of Columbia, commonly known as the O street market, and The District of Columbia, a municipal corporation, for that, heretofore, to wit, on and prior to the 26th. day of August, 1901, the defendant market company was engaged in letting out for hire certain stalls or space in its market building, situated as aforesaid, and in letting out for hire to various

persons space on the public pavement or sidewalk of the city of Washington, District of Columbia, to wit, the pavement or sidewalk of the west side of said 7th. street, between O and P streets, and in particular letting out to certain person or persons vending or having for sale market or garden truck, vegetables, fruit etc., the sidewalk space near or in front of the store let by said market company to persons carrying on business under the style and name of to wit, Henrietta Cohen, and the plaintiff avers that it was and became the duty of the said market to keep the approaches of the said market free from obstructions and in a safe condition for pedestrians along said street or to such as might lawfully be thereon for the purpose of trading with the lessees or the licensees of the market company and to refrain from unlawfully letting out for hire the said public sidewalks and pavements for any purposes whatsoever and in particular for any purpose liable to cause said public pavement or sidewalk to be in an unsafe condition for customers or pedestrians aforesaid; and it was the duty of the defendant, The District of Columbia, to prevent the unlawful use of said sidewalks or pavements or to suffer and permit the latter to be obstructed or rendered in an unsafe condition for pedestrians or persons lawfully upon said sidewalk or pavement, yet nevertheless the plaintiff avers that on or before the date aforesaid the defendant market company did wrongfully and contrary to law and the statute in that case made and provided let out for hire to certain persons vending or having for sale market or garden truck vegetables, fruit etc. the said sidewalk space near or in front of the premises let by the said market company to said Henrietta Cohen or the persons carrying on business under the name and style of, to wit, Henrietta Cohen, and this the defendant, The District of Columbia, knew and wrongfully suffered and permitted in violation of its duty in the premises; and the plaintiff avers that as a result of the carelessness and negligence of the defendant, The District of Columbia, in suffering and permitting said unlawful use and occupation of the public street, sidewalk or pavement by the lessees or licensees of the market company or in allowing and permitting the said sidewalk, street or pavement to remain in an unsafe condition for pedestrians and other persons lawfully thereon; and, through the carelessness and negligence on the part of the defendant, the market company, in permitting the said sidewalk or pavement to become in an unsafe condition from the accumulation of dirt, refuse, fruit and vegetable peelings, slime etc., which rendered said pavement so covered, slippery and dangerous the plaintiff, while proceeding with due care along said sidewalk or pavement, and at the invitation of the defendant, slipped and fell to the ground upon certain dirt, refuse, fruit and vegetable peelings, slime etc., thereupon accumulated by reason of said occupancy of said sidewalk by said defendant market company and its said lessees or licensees, vendors of fruit, vegetables, garden and market truck by reason of all of which the plaintiff fell and was injured as aforesaid, her head, neck,
2 shoulders, body and limbs being severely bruised and contused, her right forearm severely broken, fractured and sprained and the ligaments lacerated and torn, her right shoulder

and upper arm strained and hurt, and the ligaments thereof torn and strained, by reason of which she became and is sick, sore, wounded and disabled and has endured mental suffering and bodily pain for a long time, to wit, hitherto, and she has been obliged to expend and lay out and will be obliged to expend and lay out large sums of money for electrical and massage treatment and other medical aid and attendance, and she has been, and will be prevented for a long space of time from attending to the lawful business by her to be transacted during that time, to the damage of the plaintiff in the sum of $10,000. Therefore the plaintiff claims the sum of $10,000. in the course of this suit.

Second Count.

The plaintiff also sues the defendants, and for cause of action states as follows:

The plaintiff is, and at the time of the grievances herein after complained of was a resident of the District of Columbia and a patron of The Northern or O street Market Company, one of the defendants herein.

Of the defendants, The Northern Market Company is and at the time of the commission of the said grievances was a body corporate, organized and operating under and by virtue of the laws of the United States and is and then was in possession and control of a certain market house in the city of Washington, District of Columbia, known as the Northern market or the O Street market, and located, to wit, on the northwest corner of Seventh and O streets in said city and extending along Seventh street a certain distance from the aforesaid corner, and also was engaged in maintaining as appurtenant to or as an approach to or as a part of said market house, and as an incident to its business as a market corporation, and in front of certain stores or buildings owned or controlled by it the said defendant, The Northern Market Company, and almost immediately adjoining said defendant's market house certain places on the sidewalk of a certain public street of the city of Washington, known as Seventh street, north of said market, to which vendors of country produce, hucksters and others having marketable things to sell were invited to *to* repair by said market company for the purpose of transacting business in connection with or as a part of said market with the patrons of said market and which invitation at the time of the occurrences and grievances herein alleged was availed of by certain hucksters, farmers, vendors of country produce and others and by many patrons or customers of said market company, including the plaintiff herein and that it then and there became and was the duty of the said market company to exercise due and reasonable care to keep and maintain not only its said market house but the space on the sidewalk between the stores it owned or controlled and the curbing and sidewalk whereon the aforesaid hucksters and vendors of produce displayed their wares, produce and other articles in a safe and proper condition and free from peelings, vegetable matter, fruit or other market refuse.

That the District of Columbia, also named as defendant herein, is a municipal corporation created and existing under and by virtue of the laws of the United States, and that before and at the time of the grievances herein mentioned there was and from thence hitherto has been and still is a certain common and public street, highway and sidewalk known as Seventh street, in the city of Washington in the District of Columbia, for all the residents and citizens of said District, and all other persons, to go, pass and repass, and which said street or highway or sidewalk the defendant, the said District of Columbia, was bound to keep and maintain in good and proper and unobstructed condition and free, so far as due care might make the same possible, from peelings, vegetable matter or refuse and safe for persons lawfully passing over and along said sidewalk.

Yet the said defendants, well knowing the premises heretofore and their duty in respect to the places hereinbefore dscribed, in violation of their said duty to keep the street in a safe and proper condition for pedestrians as aforesaid, permitted the sidewalk on Seventh street north of the market house aforesaid between the stores owned by the defendant The Northern Market Company, as aforesaid, and the curbing and sidewalk adjo*u*rning said stores occupied by vendors of produce and other things to become and be in an unsafe condition for persons passing along said street by reason of peelings, vegetable matter, fruit or refuse from the stands of the hucksters and venders of produce and others aforesaid, of all of which facts and things herein recited the District of Columbia had notice, whereby and by reason whereof the plaintiff, on to wit, the 26th day of August, 1901, while lawfully passing along said Seventh street and availing herself of the invitation of said market company to deal with its tenants, licencees or the aforesaid hucksters, venders, farmers, gardeners and others maintaining places of business either in said market house or on the sidewalks as described aforesaid, and while she, the said plaintiff, was using due care in that behalf trod on certain peelings, vegetable matter, fruit or refuse so, as aforesaid negligently on the *the* sidewalk aforesaid and by reason whereof she did slip and fall and then and there was violently precipitated to the sidewalk, the radius of her right arm was broken and fractured near its distal extremity and certain connected ligaments were strained and lacerated and broken and the use of her right hand and arm permanently impaired and the bones and muscles of her right shoulder were severely sprained, bruised wrenched, torn and twisted and permanently impaired, and she was grievously bruised, made sick, sore, lame and disordered, and suffered great bodily and mental pain and anguish and a great shock to her nervous system,
4 and was otherwise greatly hurt and injured, and from thence hitherto as a result of such injuries, caused as aforesaid, has suffered great physical and mental pain, and was and has been permanently injured and also by means of the said premises, she, the said plaintiff, was compelled to lay out large sums of money for medical attendance, medicine, massage and electrical treatment and other expenses in endeavoring to be cured of said wounds, sickness, lameness and disorder so occasioned as aforesaid and has been and is, by means of the premises, otherwise greatly injured and damni-

fied. Wherefore the said plaintiff says that she is injured and has been damaged to the amount of ten thousand ($10,000) dollars and costs, and therefore she brings her suit.

Third Count.

The plaintiff also sues the defendants for that at the time of the grievances herein recited she was a resident of the District of Columbia and entitled to free and safe access and passage along and over the public streets of the city of Washington, in said District, and the Northern Market Company was a corporation under the laws of the United States engaged in the business of keeping and maintaining for profit a certain market, to wit, on Seventh street between O and P streets, northwest, in the city of Washington, District of Columbia and the District of Columbia was a municipal corporation charged with the enforcement of the statutes and lawful police and other regulations relating to the said city of Washington and District of Columbia aforesaid, and also with the care, preservation and safety for public uses of the streets and sidewalks of said city. That it then and there became and was the duty of said market company and of said District of Columbia, defendants herein, to make or permit no unlawful use of said public streets, to do or permit no act which would cause an unlawful obstruction on said public streets or sidewalks, or that contrary to law or lawful police regulations would naturally and as a consequence cause to be on said public streets stands, barrels, produce, refuse, peelings or other articles whose presence there might endanger the safe and proper use of said public streets or sidewalks by plaintiff while in the exercise of due care on her part; yet that nevertheless the defendants herein, in violation of their said duty, and with knowledge and notice of the facts herein set forth, undertook to and did create or did permit the creation or deposit in said public streets and sidewalks of unlawful obstructions, of barrels, stands, peelings, vegetable refuse, fruit or other matter whereby and in consequence of said illegal occupation and obstruction of said public streets and sidewalks plaintiff was permanently injured while walking along said public streets to wit, on the 26th day of August 1901, and while exercising due and reasonable care on her part, which aforesaid allegations are more particularly and fully set forth hereafter, as follows, to wit:

5 The Northern Market Company on and before the injuries to plaintiff, to wit, on the 26th day of August 1901, operated and maintained a certain public market on Seventh street between O and P streets northwest, in the city of Washington, District of Columbia, and owned or controlled a market house at the northwest corner of Seventh and O streets and also owned, possessed or controlled certain lots and the stores and buildings therein situated on the west side of Seventh street, a short distance north of said market house building, and extending along said Seventh street to the corner of said P street aforesaid, which said stores and buildings the market company rented, leased, or let to certain tenants, including one at to wit No. 1424 Seventh street to a certain tenant doing business under the style of, to wit, Henrietta Cohen. That

said market company at and before the date of plaintiff's injuries illegally usurped power and dominion over the curbing and part of the sidewalk adjoining the stores and buildings owned by it, to wit, from Henrietta Cohen's store aforesaid north along Seventh street to the corner of P street and undertook to and did without warrant of law utilize said public curbing and sidewalk as an adjunct to or part of their said public market house, all of which facts and acts The District of Columbia, defendant herein, was or in the exercise of due and reasonable diligence on its part would have been cognizant but nevertheless illegally permitted to continue to be exercised by said market company. That the said market company with the knowledge or acquiescence of said other defendant, The District of Columbia, undertook to and did invite, authorize, permit or allow certain gardeners, farmers, hucksters and other vendors of country and other produce to occupy from time to time on certain days of the week the curbing and sidewalk in front of their, the said market company's stores and buildings on Seventh street, northwest, in the city of Washington, District of Columbia, extending from said place of business of, to wit, Henrietta Cohen, northward to the corner of P street, and did invite, permit authorize or allow the aforesaid hucksters, vendors and others to back their horses, wagons and other vehicles up against the curbing in front of the stores and buildings owned or controlled by the said market company and to maintain them there for hours at a time on certain days of each week and during said periods of time aforesaid to place stands, barrels, and other obstructions on the sidewalk next the curbing aforesaid, on which stands, barrels, and other obstructions were placed vegetables, produce, fruit and other articles for which said hucksters venders of produce and others aforesaid desired to obtain a sale and with knowledge that peelings, vegetable matter and refuse would or might be expected to become and be on the sidewalk adjoining said stands, barrels etc. That said market company from the hucksters, venders and others making use of the sidewalk and curbing adjoining their stores or buildings aforesaid collected and received a certain tribute, exaction or payment, to-wit, from each or many of said hucksters, venders and others aforesaid a daily charge, fee
6 or payment of, to-wit, ten cents per day for each day said hucksters, venders and others aforesaid used said curbing and sidewalk adjoining the stores and buildings described of said market company, of all which facts and acts the District of Columbia had or in the exercise of due and reasonable care on its part, would have had knowledge. That in consequence of said illegal occupation or use of the curbing and sidewalk aforesaid the said sidewalk was obstructed, its available width to the public and to the plaintiff diminished and said sidewalk made unsafe by reason of the presence thereon of peelings, vegetable matter, refuse and other matter, debris from the stands hereinbefore referred to and which said peelings, vegetable matter and other debris aforesaid unlawfully, carelessly or negligently were permitted to be on said sidewalk. In consequence of the matters hereinbefore referred to plaintiff while walking along said Seventh street and exercising due and reasonable care on her part slippd and fell and was precipitated with great violence to the

ground, to wit, at or about the portion of the said sidewalk in front of, to wit, No. 1424 Seventh street, the place of business of the aforesaid Henrietta Cohen, on the 26th day of August, 1901, and the radius of her right arm was broken and fractured near its distal extremities and certain connected ligaments were strained and lacerated and broken and the use of her right arm permanently impaired and the bones and muscles of her right shoulder were severely sprained, bruised, torn, wrenched, and twisted and permanently injured, and she was grievously bruised, made sick sore, lame and disordered and suffered great bodily and mental pain and anguish and a great shock to her nervous system, and was otherwise greatly hurt and injured, and from thence, hitherto, as a result of such injuries caused as aforesaid, has suffered great physical and mental pain and was and has been permanently injured and also by means of the said premises she, the said plaintiff, was compelled to lay out large sums of money for medical attendance, medince, massage and electrical treatment and other expenses in endeavoring to cure her wounds, sickness, lameness and disorder so occasioned as aforesaid and has been, and is, by means of the premises, otherwise greatly injured and damnified.

Wherefore the said plaintiff says that she is injured and has sustained damages to the amount of ten thousand ($10,000) dollars and costs, and therefore she brings her suit.

CHAS. H. MERILLAT,
EUGENE CARUSI & SONS,
Attorneys for Plaintiff.

The defendant is to plead hereto on or before the 26th day of —— exclusive of Sundays and legal holidays, occurring after the day of the service hereof, otherwise judgment.

CHAS. H. MERILLAT,
EUGENE CARUSI & SONS,
Attorneys for Plaintiff.

7 *Plea of Defendant The District of Columbia.*

Filed February 18, 1902.

In the Supreme Court of the District of Columbia.

At Law. No. 45216.

JANE O. DWYER, Plaintiff,
vs.
NORTHERN MARKET COMPANY and THE DISTRICT OF COLUMBIA, Defendants.

The defendant, The District of Columbia, for plea to the plaintiff's declaration filed herein, says it is not guilty in manner and form as alleged.

A. B. DUVALL,
E. H. THOMAS,
Attorneys for the District of Columbia.

Plea of Defendant Northern Market Company.

Filed February 24, 1902.

In the Supreme Court of the District of Columbia.

At Law. No. 45216.

JANE O'DWYER, Plaintiff,
vs.
NORTHERN MARKET COMPANY and THE DISTRICT OF COLUMBIA, Defendants.

The defendant, Northern Market Company, for plea to the declaration filed in the above entitled cause says that it is not guilty as alleged.

ARTHUR PETER,
MICHAEL J. COLBERT,
Attorneys for Defendant.

Joinder in Issue.

Filed March 11, 1902.

In the Supreme Court of the District of Columbia.

At Law. No. 45216.

JANE O'DWYER, Plaintiff,
vs.
NORTHERN MARKET COMPANY and THE DISTRICT OF COLUMBIA, Defendants.

The plaintiff joins issue on the defendants' plea.

CHAS. H. MERILLAT,
CARUSI & SONS,
Attorneys for Plaintiff.

8 *Memoranda.*

November 18, 1903.—Judgment on verdict for defendants—Appeal by plaintiff.
June 24, 1904.—Mandate of Court of Appeals reversing Judgment filed.
July 6, 1904.—Judgment set aside and new trial granted.
January 10, 1906.—Verdict for defendants.

Supreme Court of the District of Columbia.

FRIDAY, *February 2nd,* 1906.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

No. 45216. At Law.

JANE O'DWYER, Plaintiff,

vs.

NORTHERN MARKET CO. and THE DISTRICT OF COLUMBIA, Defendants.

Upon consideration of the motion for a new trial filed
9 herein it is ordered that said motion be and is hereby overruled, and judgment on verdict is ordered. Thereupon, it is considered and adjudged that the plaintiff herein, take nothing by this action, that the defendants go hereof without day, be for nothing held and recover of plaintiff their costs of defense, to be taxed by the Clerk and have execution thereof.

From the foregoing judgment the plaintiff by her attorney, in open Court notes an appeal to the Court of Appeals, and prays that bond be fixed. Whereupon it is ordered that plaintiff furnish bond for costs on such appeal, with surety or sureties to be approved by this Court in the sum of One Hundred Dollars, with leave to deposit in lieu thereof the sum of Fifty Dollars in the Registry of this Court.

Memoranda.

February 21, 1906.—$50 deposited by appellant in lieu of appeal bond.

March 20, 1906.—January Term of Court prolonged 38 days to settle exceptions, and time to file record in Court of Appeals extended to April 30, 1906.

April 19, 1906.—Time to file record in Court of Appeals further extended to May 20, 1906.

10 May 7, 1906.—Bill of Exceptions submitted to Court and time to file transcript further extended to July 1, 1906.

Supreme Court of the District of Columbia.

MONDAY, *June 18th,* 1906.

Session resumed pursuant to adjournment, Hon. Dan Thew Wright, Justice, presiding.

No. 45216. At Law.

JANE O'DWYER, Plaintiff,

vs.

NORTHERN MARKET CO. ET AL., Def't-.

The Bill of Exceptions hereto submitted herein being this day signed, is hereby made of record now of the time of the noting

thereof at the trial and time to file transcript extended to August 15th, 1906, inclusive.

11 *Bill of Exceptions.*

Filed June 18, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 45216.

JANE O'DWYER, Plaintiff,
vs.
NORTHERN MARKET COMPANY and THE DISTRICT OF COLUMBIA, Defendants.

Be it remembered that the above entitled cause came on for trial on the 6th day of January, 1906, before Mr. Chief Justice Clabaugh and a jury, Messrs. C. H. Merillat, and C. F. Carusi appearing on behalf of the plaintiff, Messrs. M. J. Colbert and Arthur Peter on behalf of the defendant, The Northern Market Company, and Mr. H. P. Blair on behalf of the defendant, The District of Columbia.

And thereupon the plaintiff to maintain the issues upon her part joined, gave evidence by the following witnesses, tending to prove as follows:

JANE O'DWYER, plaintiff, testified that for many years she had dealt at the market of the defendant market company on the west side of Seventh Street, between O and P streets in the City of Washington, D. C., three or four days each week, and on August 6, 1901, about 9:30 to 10:00 o'clock while on her way to do her marketing slipped and fell on some vegetable matter on the sidewalk in front of the second-hand clothing store occcupied by Henrietta
12 Cohen on Seventh Street between O and P. The market company's building ran from O Street along Seventh about midway to P Street and the market company owned the building occupied by Henrietta Cohen and all the other stores on Seventh Street except McIllveen's and Taylor's. The entire sidewalk from O to P except in front of McIllveen's and Taylor's was occupied by country dealers and hucksters selling vegetables and fruits. They occupied with their stands and produce about four feet of the sidewalk from the street curb and the sidewalk was about twelve feet from curb to the store buildings. The stands and trays on which the dealers placed their produce when not in use were kept on vacant ground belonging to the market company in front of the fish market, which set back in a sort of recess from the street. The market master collected each market day ten cents from the dealers who stood on the sidewalk. She slipped and fell on some vegetable or apple matter; it was green or slimy. The sidewalk at and about Mrs. Cohen's place was very crowded at the time, so that they had to edge along to make their way through. "I slipped. I looked and saw the vegetable matter or fruit—whatever it might be—ahead

of me as they picked me up." Before two ladies picked her up after she fell witness noticed the sidewalk where she fell was in a very dirty condition, strewn all over with vegetable matter. The dealers in front of Mrs. Cohen sold vegetables and fruits. He right arm was broken near the wrist and her shoulder dislocated by the fall.

13 On cross examination witness testified that she had not fallen on a banana peel, that what she fell on was something green; it was green vegetable matter was all she could say as to its nature. She could not say how long this vegetable matter had been on the sidewalk that morning. She was positive it was green vegetable matter on which she slipped because when they picked her up she looked to see what it was she had fallen on and she could see the effect ahead on the bricks, green, slimy like ahead of her. She was sure it was that piece on which she had fallen. The sidewalk was cleaned and made neat and tidy each day after market was over, but prior to her accident she never saw any effort made to keep it clean during market hours.

Drs. Charles Koones and Lewis Wilson gave evidence tending to prove plaintiff had been permanently injured.

Katherine S. Roman testified that her husband was a physician and prior to the accident to plaintiff they lived on the corner of Eighth & P Streets. Asked to describe the condition of the west side of Seventh Street between O & P the summer of the accident prior to August 21st, witness replied: "It was in a bad condition always, with vegetable peelings and refuse from the people who kept the stands there on the sidewalk. I complained to the market master about it several times and told him that he would have to have it cleaned; I was afraid to walk on it and the odor from those vegetables was very bad." She had told the market master if he

14 did not clean the sidewalk Dr. Roman would have to complain to the health officer. The conditions were worse in front of the stands from Mrs. Cohen's, which was the third store from P Street, to P Street than further south. The morning of the accident she went to market about 8:00 o'clock and observed that at that time the sidewalk "was in a miserable condition, like it was slippery, and I could see these peelings and vegetable leaves around, and just the same as I had been seeing it for a considerable time." Hucksters and countrymen dealing in greens and vegetables were in front of Mrs. Cohen's and the litter on the sidewalk was of the same nature. She remembered conditions the day of the accident because they left that day for New York on the 10:00 o'clock train and just as they left the house her husband was sent for to attend to a lady who had fallen and when they returned they learned it was Mrs. O'Dwyer. She never had observed any effort to clean the sidewalk during market hours.

On cross examination witness said the morning of the accident the whole sidewalk was strewn with refuse. She denied it was only of the odors she had complained to the market master. The sidewalk would get nearly an inch thick with dirt from vegetable leaves

and fresh droppings caked and packed down. They had made attempts to clean the sidewalk that summer and when the market master told her they did clean it she had replied then that he must hose it if he wanted to get the dirt off. She said conditions had been bad for ten years, but she had not complained before, but did in 1901 because conditions got so bad that summer. It was decidedly worse the summer of 1901 than before.

Mrs. HENRIETTA COHEN testified that at the time of the accident she leased a store from the market company on Seventh Street near P, paying her rent to the market master. The market company occupied the sidewalk immediately in front of her place of business and the market master each day collected from the hucksters in front of her place. The morning of the accident vegetables and tomatoes had been thrown on the sidewalk all the way up to her door by persons who worked for the hucksters. She had complained to them and an half hour or an hour later plaintiff fell. The boys working for the hucksters had done the same thing before that that summer; there quite often was green and vegetable stuff on the sidewalk and she had complained to the market master. The market company so far as she knew never made any effort to keep the sidewalk clean during market hours, but did clean it when the market was over, employing two men for the purpose. Witness had no control whatever over the sidewalk. After plaintiff fell witness helped her in the drug store.

Mrs. FANNIE WILLIAMSON testified that at the time of the accident she was immediately behind plaintiff and picked her up. Plaintiff fell in front of Mrs. Cohen's. The dealers on the sidewalk there sold green stuff, potatoes and other produce that was in season. The sidewalk where plaintiff fell was dirty with cleanings, looking like spinach cleanings and kale scattered along on the sidewalk and cellar door in front of Cohen's. The summer of and prior to the accident the sidewalk was kept pretty dirty, but very nice since then. Plaintiff slipped on something green where the sidewalk and the cellar door met. It loked like dirty peelings from other vegetables. Plaintiff at the time was walking along steadily and all at once her foot slipped and she fell on her arm.

On cross examination witness said all she noticed was that the stuff plaintiff fell on was dark green and dirty. There were several pieces of stuff and a great deal of dirt there. Plaintiff did not fall on the dirt, but on something green. Witness had been living — nearly four years and never had complained of conditions.

GRIFFITH L. JOHNSON, the stenographer who had reported the proceedings at the former trial of this cause thereupon was put on the stand and plaintiff's counsel examined him with a view to proving by the stenographic notes taken by witness certain admissions made at the former trial by Jesse B. Wilson, president and treasurer of the market company, whom plaintiff had then put on the stand as a witness. Thereupon counsel for the market company objected that

Mr. Wilson was in court, whereupon after counsel for plaintiff had stated to the court that they expected to prove that Mr. Wilson had testified he was president and treasurer of the market company at the time of the accident and at the time of trial and had admitted that some one for the market company collected ten cents a day from the hucksters who occupied the sidewalk; that the company did this "under the authority that a party comes down there and says "I want so much—ten cents—for your standing here," and that all he knew about the matter or the right to collect was that he got the money, which was what he was after and that he never visited the market, the court, on the ground that at the former trial plaintiff had put Mr. Wilson on the stand and that Mr. Wilson was in court refused to permit plaintiff to put in evidence Mr. Wilson's former testimony, whereupon plaintiff then and there noted an exception.

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JESSE B. WILSON thereupon was called by plaintiff testified that he had been president and treasurer of the market company since its existence. The company owned all of the west side of Seventh Street from O to P except two stores. The company owned the store formerly occupied by Henrietta Cohen and there was produced and put in evidence the lease from the market company to Mrs. Cohen, said lease having the following paragraph therein: "It is understood and agreed that country traders and teams will be allowed to occupy the space in front of said store to the curb for displaying and selling goods and that the clerk of the market will be allowed to collect for same and shall see that the space is cleaned up after the persons and teams have left."

Asked under what authority the market collected payment from each person occupying the sidewalk witness replied: "I think the market master said to me that he was collecting from those parties. He did it upon his own motion." The company received the proceeds.

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Counsel for plaintiff thereupon asked witness if at the former trial when asked under what authority he had not replied—whereupon counsel for the market company objected and the court said that the point of view taken by plaintiff was the first in his experience. If counsel would say witness had made a different statement "which takes you by surprise, you can use that statement not as being evidence for the jury, but merely as explaining to the jury why you have called this witness," whereupon counsel said he expected witness to answer the question the same way he had under oath on the former trial. After it was required that plaintiff's counsel should submit his questions in writing to the court defendant finally withdrew his objection and witness was asked if at the former trial when asked under what authority they collected from persons having stands on the sidewalk he had not replied "under the authority that a man comes down there and he says 'I want so much—ten cents—for your standing here' " and if he had not when asked "you only know that you get money from these hucksters" replied "Yes, that is what I came after," whereupon in answer to each inquiry as to his former testimony witness replied "possibly." Asked if when at the

former trial he was asked what knowledge he had of the company cleaning the sidewalk he had not responded that he never visited the market witness testified "If I said that I said it ironically,
19 that is all." He added "I do visit the market company."

On cross examination Mr. Colbert asked the witness to state from his own observation in what condition the sidewalk in front of the market on Seventh Street was kept "immediately before the accident; six months before" the accident, whereupon counsel for plaintiff objected that the question was incompetent as regards the market company at least, as no notice whatever was required as to the market company and it was immaterial whether they had cleaned the sidewalk on other occasions or not. After extended argument the court said the question would come up on the prayers and instructions and that counsel was trying the case on the law before the evidence was all in, whereupon counsel for plaintiff noted an exception on the ground the question was irrelevant and incompetent. The witness replied that personally he did not know. Witness testified that the market company exercised no control over the country men and hucksters who came and sold goods on the sidewalk, had no authority to keep them away, did not attempt to do so, did not invite them to come there and had not control over their movements. The company had no control over the streets and sidewalks in the neighborhood. The company had been there 30 years.

Here the plaintiff rested her case and announced that she had no other or further testimony to offer whereupon the defendants offered testimony by the witnesses named tending to prove as follows:

20 WILLIAM H. COVINGTON, a witness produced by the defendant market company, was examined by Mr. Colbert. He testified that he had been market master of the defendant company about 25 years. He first heard of the accident two or three days after the occurrence.

Q. Tell the jury, during the summer we will say, or within six months prior to the day of this accident, what condition you kept the sidewalks in, with reference to being cleaned or otherwise, so far as concerns the Northern Market Company.

Counsel for plaintiff objected the question was irrelevant and incompetent as affecting the market company, but the court overruled the objection and plaintiff thereupon noted an exception.

A. From my own observation I have been out there in years before that to see that the sidewalk was kept clean, and I was there at night, after 12:00 o'clock Saturday night, and in the daytime after the market is over, and I have stood there in the rain and had my man clean the sidewalks and given instructions and seen them go out with the brooms, if there was anything on the sidewalk to clean it off.

That, witness said, occurred every market day. He had two men and sometimes extra men to clean up. Whenever they would see anything during market hours it would be cleaned off. Asked as to collecting ten cents a day from outside dealers witness said a piece of

ground belonged to the company and the company charged
21 those selling ten cents for storing their stands on the market property. If they did not want to store their stands there from one market day to another after market was over they did not have to pay anything. As he understood the law for many years it gave the market master the right to the whole sidewalk and fifteen feet of the street. Asked what was the condition of the sidewalk the day of the accident witness said he had no particular recollection of its condition this particular day. Over objection of plaintiff witness testified that there was no difference in the cleaning of the market between different days and it was thoroughly cleaned one day with stiff brooms just the same as another.

On cross examination witness testified that the countrymen occupied with their stands in summer all of Seventh Street from O to P Streets except in front of McIlvaine's and Taylor's. The market company did not own these two stores. It had been set apart for them, by custom. If their stands took up more room of the sidewalk than three feet from the curb he moved them back. He did not know by what authority he did that and had no authority. They always would move, however, if he asked them. On Saturdays he would collect 15c. and on other days 10c.; this was because their stands might have been stored there all week. Asked what he charged those who occupied the sidewalk up against the market building counsel for the market company objected. Plaintiff testified
22 this building was up at the other end of the block from the scene of the accident, but said he asked the question to prove the market company's control. The court limited the question merely as going to the witness' credibility and counsel for plaintiff noted an exception. Witness said the stands on the sidewalk against the building paid $1.50 a month. Persons coming to sell sometimes had no trays or stands, but took others from the company's lot and he charged them ten cents and kept it. Witness said he never had known any vegetable or refuse matter to get off the stands on to the sidewalk, but thought he had seen customers drop some from their baskets. Witness said he exercised supervision over the whole of the sidewalk, but did it merely as a charitable act to see no one got hurt and not as a duty. He had told Mrs. Cohen she would have to let the country people stand in front of her place. Mrs. Roman had complained to him, but it was about odors from garbage barrels in the alley and not about the sidewalks. Mr. Taylor had let some persons occupy the sidewalk in front of his store, but would not let witness collect from them and witness complained to the police and the police stopped the persons from standing there.

J. P. RITTER, a witness summoned on behalf of the market company, was examined by Mr. Blair. He testified that he was a feed dealer near the market and frequently visited it during market hours to sell feed and to collect from the market people and others. He had been there 32 years. He had observed the condition of
23 the sidewalk and it was always kept clean for people to go backwards and forwards. He had not noticed any difference

in any particular summer. Thereupon counsel for plaintiff who had previously objected to evidence as to the general condition of the market maintaining that it must at least be limited as to the District to the summer of 1901 and was wholly inadmissible as to the market company again objected and on the court overruling the objection noted an exception once for all to this entire line of testimony and the court thereupon allowed plaintiff an exception to this entire line of testimony stating it went in its opinion to the weight and not to the competency. In answer to the court who asked witness if he were testifying as to the summer of 1901 witness replied: "only generally." On cross examination witness said he thought there was no difference in the condition of the sidewalk the summer of 1901 than from any other summer. He had nothing to call his special attention to it that summer. Asked if he could say of his own knowledge there was not vegetable or other matter on the sidewalk the summer of 1901 witness replied "no more than any other time." He had no personal knowledge there was not vegetable matter on the sidewalk that summer.

CHAS. F. PLITT, jeweler, HENRY C. JONES, manager of a tea store, SOMERSET R. WATERS, grocer, JOHN MCILVANE, grocer, all witnesses summoned by the market company and all doing business near the market and MAURICE JOYCE, court bailiff, who lived near the market,
24 over objection and exception heretofore noted by counsel for plaintiff testified that the sidewalk about the market always was kept in good condition and that they never had noticed any difference and each witness testified he was not speaking of any particular summer or year, but generally.

Police officers JOHN R. EVANS, ARCHIE BAKER, COLIN E. FLATHER and Capt. JAMES B. HEFFNER testified that the market was one of the most important sections in their district and that the sidewalk was always kept clean and in good condition. They had no knowledge of one summer being any different from any other summer, but as they recalled it was always kept in very good condition. The market people would clear the streets as soon as market closed and would sweep up anything if they called the market master's attention to anything. Counsel for plaintiff objected to the testimony of all these officers as irrelevant and incompetent and when his objection was overruled noted an exception, which exception was renewed and allowed when he moved the court to limit said testimony and instruct the jury it should be considered as evidence only for the District and not for the market company.

Plaintiff's counsel asked witness HEFFNER if he had enforced on this street the police regulations forbidding vendors to occupy the sidewalk, but after a long argument the court ruled out the question on the ground that the examination in chief had been confined to whether the street was kept clean and counsel for plaintiff noted an exception.

25 HERBERT RICHARDSON testified that he and another man named Gray and a little boy kept the market and the sidewalks inside the building and outside clean, going with their brooms two and sometimes three times a day.

TAYLOR GREEN, colored, testified that he worked at the Washington ab*b*at-oir, but was at the market the day plaintiff fell talking to a friend. The lady he said slipped on a banana peel which some school children had thrown down. He had helped pick plaintiff up. A colored man with a broom had gone along not over five or ten minutes before sweeping off the pavement.

On cross examination witness said he had noticed the school children going along that morning. The school was across the street, but he did not know if they were all going to that school.

BYRON WEBB, colored, testified that he was at the market selling produce and some little boys came along eating bananas and threw the skins down. He said to them "boys don't you know that is $5 fine? Pick them up," and then some customers came along and about 15 or 20 minutes after this the plaintiff came along and slipped on the banana skin.

On cross examination witness said his stand was in front of Amrein's candy store, which was the next store and south of Cohen's and plaintiff fell at the south part of Amrein's store. The boys who had the bananas were colored boys. The were school children and had their school books with them.

26 ARABELLA CARROLL, colored, testified that the day of the accident, which occurred between 9 and 12 o'clock in the morning, she saw the lady fall. Taylor Green picked her up and asked if she were hurt and she said no. Green picked up a banana skin and said some children must have been along and dropped it. There wasn't anything but the banana skin on the street then. Toney Richardson had been around and swept off just before and the sidewalk was clean.

On cross examination witness said she had been going to market every market day for fifteen years. She sold off two places she had amounting to 5½ acres, but sold nothing she did not raise except once in a while for neighbors. Her usual stand was at the corner, but this day she was right between Cohen's and Amrein's. Witness said that there had been school children along just before the accident. They had been out of school and had gone back again. She was certain she said the children had been at school that morning and thought it was after the half past nine recess. She was sure there was a session of school that day.

Q. Do you know that it was the month of August and that school does not open until the last of September, when this accident occurred? A. It was August.

Subsequently the witness said she did not know what month it was, but they were school children.

CHAS. H. PETERS, colored, testified that his stand was in front of Mrs. Cohen's and he saw her slip on a banana skin and fall.
27 Taylor Green picked her up and then threw the skin in the street. Tony Richardson had swept up the sidewalk just before this.

On cross examination witness said Richardson went along remov-

ing trash four or five times a day. He could not be positive he said whether any school children had been along that morning or not. He stood in front of Cohen's store. Amrein's store came next. It was 12 or 13 feet wide. There were many people going and coming to market and passing by that day. Arabella Carroll that day was standing up near O street, about the length of the court room from him (the court room was about 40 feet wide). There were a number of people on the sidewalk between where the plaintiff fell and where Arabella Carroll stood, but the latter could have seen plaintiff fall he insisted. He could not say what time of day the accident occurred and did not pay much attention to the time. Plaintiff did not seem to be badly hurt. Asked if she seemed in much pain he said she gave a grunt or two, that was all. No one had spoken to him of the accident after it happened until the market master spoke to him shortly before the case was up for the first trial.

In rebuttal plaintiff was recalled and testified that when she fell no man came up and showed her a banana skin or anything of that sort.

Q. Did you fall on a banana skin? A. Not that I know of.

On cross examination witness said that when she fell she saw a green substance on the ground. What it was she did not
28 know and could not say it was not a green banana skin.

Mrs. FANNIE WILLIAMSON was recalled and testified that she did not hear the Witness Taylor Green or any man say to plaintiff she had fallen on a banana skin. Witness was with Mrs. O'Dwyer all the time. Arabella Carroll's stand until just recently was down near the corner. Plaintiff when she fell could not speak; she was speechless and only groaned.

This closed the testimony on both sides and the foregoing is all the evidence that was offered or given for or on behalf of either or all of the parties at the trial. And thereupon after the foregoing proceedings, which are made a part hereof, the several parties litigant by their counsel prayed instructions and the hereinafter proceedings took place upon said instructions.

The plaintiff offered the following instructions which were granted by the court:

Prayer I.

The jury are instructed that if you find there was litter or refuse matter on the sidewalk at the place of the accident and that the littering of the sidewalk was the ordinary and usual result of the marketing business carried on there and that the market company was a party to this conducting of the marketing business on the sidewalk that it was its duty to keep the sidewalk clean and safely passable at all times from obstruction with vegetable, fruit or refuse matter and if you find it failed in this duty and that the
29 plaintiff thereby was injured then the market company must respond to the plaintiff in damages for her injuries. You are instructed that the market company could not restrict its dili-

gence in keeping the sidewalk clean and free of vegetable or other matter to times after the market had closed but must keep the same clean and safely passable at all times. You are further instructed that the cellar door in front of the market company's stores is part of the sidewalk.

Granted.

Prayer II.

The jury are instructed that the use of the public sidewalk on Seventh Street for market purposes was illegal and constituted a nuisance and if you find that the market company was a party to the use made of the public sidewalk and that the plaintiff as a result of use of the public sidewalk for market purposes was injured thereby, the market company is liable to the plaintiff in damages. In determining whether the market company was a party to the use made of the sidewalk for market purposes you may take into consideration all the evidence in the case, including the lease in evidence, the collection of money from the market people, the cleaning of the sidewalk and streets after market hours, the use of the market property as a place for stands and boxes for hucksters and country people and any and all other evidence in the case bearing upon this question.

Granted.

30 *Prayer III.*

The jury are also instructed if they find that the District of Columbia with knowledge thereof permitted the use of the sidewalk on Seventh Street for market purposes and knew or in the exercise of ordinary care and prudence should have known that such use of the public sidewalk was calculated to cause the sidewalk to have refuse matter thereon and to become in an unsafe condition for pedestrians, and that this use of the sidewalk for market purposes caused the injury, that then the District of Columbia also is liable to the plaintiff in damages.

Prayer IV.

The jury are instructed that if they shall find that the plaintiff was injured as a result of the slippery and unsafe condition of the sidewalk at the place of the accident if you find that said place was slippery and unsafe and that this condition was the result of the occupation of the sidewalk by vendors of produce of whom the market company collected money and to sell produce on the sidewalk in front of the market company's stores that the said market company were liable to the plaintiff for damages.

Granted.

31 *Prayer V.*

The jury are instructed that it is the duty of the District of Columbia to keep the sidewalks of the street in a reasonably safe and unobstructed condition and if they shall find that the said sidewalk

at the time of the accident was slippery and unsafe the District of Columbia is liable to the plaintiff provided it had reasonable notice of such condition and that this condition caused the injury.
Granted.

Prayer VI.

The jury are instructed that notice by the District of Columbia of the condition of the sidewalk on market days may be presumed from existence of such condition for the time sufficiently long to have enabled the District through its employees in the exercise of ordinary diligence to become aware of the same.
Granted.

And thereupon the defendant, the Northern Market Company, offered the following instructions which were granted by the court and the plaintiff by her counsel then and there objected to the granting of the prayers numbered 4, 5, 6 and 8 and severally excepted to the granting over her objection of each and every of said prayers and the said several exceptions were then and there noted on the minutes of the court:

32

Prayer IV.

The jury are instructed that the plaintiff in this action can only recover against the Market Company upon the theory that said company were guilty of some negligence and the burden is upon the plaintiff to show by a preponderance of the evidence that said company were guilty of such negligence.

V.

It was the duty of the plaintiff in walking along the street in front of the Market Company's premises to use due and reasonable care for her own safety, and if the jury find from all the evidence that the accident complained of was caused in whole or in part by inattention or negligence on the part of the plaintiff herself, such as a reasonably prudent person would not be guilty of, then the verdict should be for the defendants.

VI.

If the jury finds from the evidence that the defendant, the Northern Market Company, its agents, servants or licensees were conducting or maintaining a market or place of business on the sidewalk where the plaintiff fell, yet their verdict must be for said defendant, unless they find that said defendant did not on the day of the accident exercise reasonable diligence under all the circumstances given in evidence to keep said sidewalk where the plaintiff fell in a reasonably safe condition and that the accident to the plaintiff was caused thereby.

33

VIII.

The jury are instructed that their verdict must be for the defendant, the Northern Market Company, unless they find that the said defendant, its agents, servants or licensees were conducting or maintaining a market or place of business on the sidewalk or street where the plaintiff fell.

And thereupon, the defendant, the District of Columbia, requested and the court, over the objection severally then and there made, granted the following instructions requested by the District of Columbia and the plaintiff then and there duly excepted to the granting of each and every of said instructions and the said several exceptions were duly and severally noted on the minutes of the court.

34 IV. The jury are instructed that there is no evidence in this case of actual knowledge by the defendant, the District of Columbia, of either the alleged filthy condition of the sidewalk at the place of the accident or of the existence and location at that point of the alleged green vegetable matter on which it is alleged the plaintiff slipped and fell.

V. The jury are instructed that the defendant, the District of Columbia, is not liable in this case, unless they shall find the green vegetable matter on which the plaintiff says she slipped, if they find she did so slip, had been so long on the sidewalk that said defendant in the exercise of reasonable care and caution should have obtained knowledge of the same. And in this connection the jury are instructed that the law does not require impossibilities of any person, either natural or artificial, and the presence of green vegetable matter on the sidewalk at the point indicated in the evidence does not, of itself impute notice to the defendant, the District of Columbia, unless such alleged condition of the sidewalk had so long continued as to afford constructive notice to said defendant.

VI. The jury are instructed that it was the duty of the defendant, District of Columbia, although it permitted the occupation of a part of the sidewalk by the defendant market company, to keep
35 the remainder of said sidewalk in reasonably safe condition for the use of pedestrians and for obstruction on said sidewalk not caused by itself or its own agents or employees, said defendant, District of Columbia, is not liable unless, it had notice of the obstruction, or unless the obstruction had lasted so long and under such circumstances that, with due diligence, it should have known of its existence.

Granted—Excepted To.

And thereupon, the counsel for the respective parties litigant addressed the jury and each of said counsel read to the jury the instructions and each of them granted by the court upon the request of the counsel addressing the jury and who had requested the said instructions.

And thereupon, after the instructions had been granted, and the same had been read to and argued to the jury by counsel for the respective parties the court charged the jury as follows:

Charge to the Jury.

The COURT: This is a somewhat peculiar case in some of its aspects, and for that reason I shall have to ask your close attention to what I shall have to say.

The complaint is that the plaintiff in this cause was injured by reason of certain slippery vegetable matter being on the pave-
36 ment, by reason of which she slipped and injured herself, and that the defendants are liable for that injury. She asserts, as respects the District of Columbia, that it is the duty of the District government to keep its streets reasonably safe for the passage of people up and down those streets; that when it fails to do that, and a person is injured by reason of that failure, then the District government becomes liable for the injury to that particular person.

If you find that the injury was occasioned by this refuse matter that was left on the street,—if you find that it was left there—before you can hold the District government liable you must further find that it had notice of this obstruction on the street, this slippery refuse matter, if the street was in that condition, that being the same as any other obstruction upon the street; so that when I speak of obstruction of the street I mean in this case that character of refuse matter which the plaintiff claims was there and was the cause of the accident. So when I use that word obstruction you will understand what I mean by it.

Before you can hold the District government liable in this case you must find that it had notice of this obstruction of the pavement, in other words, that this refuse matter had been there for such a sufficient length of time as would reasonably have made the District government know of its being there. This notice can be brought home to the District authorities in two ways: first, by actual knowledge of its condition, if the condition existed—always keep
37 that in mind, whether the pavement was bad by reason of this refuse matter being there. That is a matter for you to pass upon. I do not need to suggest anything about that. That is for you entirely. You must find the fact, either that it did or did not exist there.

If you should find that the plaintiff slipped, for instance, upon a banana peel, as has been suggested here, which had been recently placed there, and that that was the cause of the accident, that would end this case as to both defendants. There would be no case here, and you would simply find for the defendants in the case.

If you find that she slipped by reason of this refuse matter being left there on the street, then, as I say, you must bring that fact home to the District government that the pavement was in that condition. There are two ways you can do that. One is by direct notice; you go to the officer of the District government and notify him that the pavement is in an unsafe condition by reason of refuse matter being permitted to remain on the pavement. That would be what the law calls actual notice.

In this case there is no evidence of actual notice. No one has testified that he notified the District government that there was this

refuse matter uopn the streets, and that it had been there for some time, nor was any complaint made to the District government about it. Therefore the Court has instructed you, as matter of law, that there is no evidence in the case to show direct notice or actual
38 notice.

There is another way that you can notify the District government, and that is when an obstruction has existed and remained so long upon the streets that the District government, through its employés, would, by the use of ordinary care, see it, and thereby have notice brought home to the government itself. Then that would be what the law calls constructive notice, that is, the existence of an obstruction for so long a time that, under all the conditions and circumstances surrounding the means and methods of the District government and the care it has or can give to the public streets by its ordinary methods, it must be presumed to have notice. It is only required to use such reasonable care and diligence as to make streets reasonably passable.

So those are the two ways in which knowledge can be brought home to the District government.

Therefore, if you find from the evidence in the case that the plaintiff slipped upon a banana peel, then that ends the case as to both defendants. They would not be liable for that obstruction, if it was placed there only a short time before, for there would not have been any reasonable chance, as you can see, for the District government to have known of it and taken it away. So the law says, under such circumstances, that neither defendant would be liable.

If the fall was caused by the condition of the street being made slippery by the falling and remaining there of this refuse material, if you find that that was the ca-se of the accident, then you
39 must go a step further and must say—I am talking now in regard to the District government—that it had existed for such a length of time as, under all the circumstances of the case, the District government ought reasonably to have known it.

Now we go a step further. What is the law, if any, as regards the other defendant in this case? That brings us to the question of the stalls or stands that were occupied by the country people, as they have been spoken of. If you find that they occupied a part of the pavement, then the unlawful occupancy of that pavement, would, in law, be a nuisance, because the public had a right to have the pavement unobstructed. But the mere fact that these stalls were there unlawfully, if they were there unlawfully, and that they occupied the pavement and thereby caused a nuisance, would not make the defendants responsible, if the accident did not happen by reason of that nuisance.

Therefore, to make the Northern Market Company defendant responsible, you must find from the evidence in the case that these people who occupied that part of the sidewalk were there under the authority or license of the defendant, the Northern Market Company; that they were there paying rental for that space, and were therefore under the authority and control of the Northern Market Company.

If they were not, if they were there merely of their own right,

and you should find that this ten cents that was paid, as
40 testified to in evidence, was paid to the Northern Market Company, not for the right to have their stalls on that pavement, but for the purpose of having their trestles or stands (these horses, as some of them are called) cared for upon the property,—if you find that they were there of their own volition, without any authority or direction of the Market Company, and then you find that the accident was caused by the refuse matter being there, then you cannot find the Market Company responsible at all, because these people were there without authority, without being under the control or guidance, of the Market Company.

But if, on the other hand, you find that they were there under the license and authority of the Market Company, paying the market Company for the privilege of being there, and thereby using the pavement or sidewalk under the authority of the Market Company, then the Market Company would be responsible in damages, provided you shall further find that the refuse material left upon the street—if you find that it was left there—was the direct cause of the accident.

If this lady was not careful in walking along, I mean was not using such ordinary and reasonable care as ordinarily prudent persons under like circumstances would have used, but was going along indeed without using such care as I have said ordinarily prudent persons would use under like circumstances, then, for that reason the accident was contributed to by herself, and, of course, she
41 could not recover, because when an accident occurs, even though the injury may be great, by the negligence of the defendant, still, if the plaintiff contributed to that accident, by his or her own carelessness, the law says the plaintiff is guilty of contributory negligence and cannot recover.

But if she was walking along the street in the exercise of ordinary and reasonable care, such as would have been used by ordinarily prudent persons in like circumstances, and if she slipped upon this green matter, as has been suggested in the evidence, and the accident happened by reason of that fact; and if you should further find that the people who occupied those stalls on the side of the pavement occupied them under the authority and with the right or assumed right acquired from the Market Company, and all these other things I have suggested, and the accident happened in that way, then the Market Company would be liable.

So, therefore, you have your choice of various verdicts in this case.

If you find from the evidence in this cause that the plaintiff was injured by slipping upon a banana peel and that that is the way in which the injury happened, then that ends the case. You need not go further in it, for you would have to find a verdict for the defendants, both of them.

But if you find that the dirt, or this refuse matter as I should properly call it, perhaps, was the cause of the accident, that is that
42 the plaintiff slipped upon this refuse matter, and that that was the cause of the accident and that it had been there for such a length of time as ought to have put the defendant, the District government, upon notice, and then, if that is the way the acci-

dent happened, the District government would have been responsible in damages to the plaintiff.

If you find that the defendant the Northern Market Company authorized and leased, in its general sense, not its technical sense, authorized the rental of this part of the sidewalk to those people who occupied it, and received this rental of this sum of ten cents, and therefore occupied that attitude towards those people, who sold things on the sidewalk, and that the accident happened by virtue of this matter being left on the sidewalk, then in that case you could find that the plaintiff was entitled to recover also against the Northern Market Company. Your verdict in that case, if you found that the matter had been the cause of the accident, and that it had been there for such a length of time that the District government ought to have known that it was there, and did not remove it, and that was the cause of the accident, then you have the right to find a verdict against the District government, and you can also find a verdict at the same time against the Northern Market Company if you find that the accident was caused by this refuse matter being left on the street and that they had rented these stalls—or whatever you choose to call them, not stalls, but stands,—to these people who stood on part of the sidewalk. In that case you could find a verdict
43 against both the defendants.

If you find—to repeat—that the accident was not caused at all by the green matter on the sidewalk, then your verdict should be for both defendants.

If you find that it was caused by the green matter, and that it had been there so long that the District government ought to have known it, as I have already said, then your verdict could be against the District government.

If you find that the Market Company controlled these spaces and authorized these people to stand there, as we have been discussing, then the Market Company is likewise liable and your verdict would be against both defendants.

If, on the other hand, you should find that this accident occurred by reason of this slippery green matter, but that it had not been there for such a length of time as to put the District government on notice, then your verdict should be for the District government. She could not recover against the District government unless it had been there for such a length of time as would bring notice home to the District government. Then your verdict would have to be against the one defendant, the Northern Market Company, if as I have said you found that they rented these stalls, and the accident happened by reason of this refuse material being on the pavement.

If you find that these stalls or stands were not under the control of the Market Company, but that all they had to do with them was to charge ten cents a day to pay for the care of them, then the Market Company, would not be liable even though the accident
44 happened by reason of the refuse matter being there.

So, gentlemen, you see the various complications, but I think you understand exactly what the law is on the subject.

If you find for the defendants, your verdict would be simply for the defendants.

If you find that the plaintiff is entitled to recover, then your verdict can be either against one or both defendants, in which case you simply say "We find for the plaintiff," because both defendants are sued jointly I believe,—you will simply say, "We find for the plaintiff," if your verdict is against both the defendants, you understand.

If it is in favor of one defendant and against the other, then you say, "We find for the plaintiff as against the District government," or "We find for the plaintiff as against the Northern Market Company," indicating which one of the defendants you find against, if you find against either.

If you find in favor of both defendants, you simply announce your verdict in favor of the defendants.

If you find in favor of the plaintiff and against both defendants, then you must say, "We find for the plaintiff against the defendants." You do not have to name them.

To go one step further, if you find for the plaintiff then there must be a measure of damages. What is the rule of law in respect of the amount that you are entitled to find? This is it:

45 The jury are instructed that if it finds that the plaintiff's injury was caused by the negligence of the defendants, either of them, it shall, in reaching the amount of damages to be awarded the plaintiff, take into consideration the nature and extent of her injuries occasioned by the accident; whether the same, in your judgment, will be permanent or not; the suffering and pain she has undergone, or which, in your opinion, from all the evidence, she may hereafter, as the result of the injuries suffered by her, or which may be suffered in future; the impairment of her general health, if you find that the same is impaired; and the shock to her nervous system, if you shall so find; and the expenses to which she has been put for medical attention; and return such a verdict as, in your judgment, will afford her fair and reasonable compensation therefor.

That is to say, if you find for the plaintiff, you are entitled to find such damages as will reasonably compensate her for her injuries, taking into consideration her pain and suffering, and whether there has been any impairment of her health; and whether the suffering is to be permament—whether these injuries are permanent or not.

I have not read all the prayers prepared by the counsel on each side, but I think I have pretty fully covered the instructions.

Mr. MERILLAT: We would like to have Your Honor read the prayer marked "1½."

The COURT: I will read it.

46 The jury are instructed that the use of the public sidewalk on Seventh Street for market purposes was illegal and constituted a nuisance; and if you find that the Market Company was a party to the use made of the public sidewalk, and that the plaintiff, as a result of use of the public sidewalk for market purposes, was injured thereby, the Market Company is liable to the plaintiff in damages. In determining whether the Market Company was a

party to the use made of the sidewalk for market purposes you may take into consideration all the evidence in the case, including the lease in evidence, the collection of money from the Market people, the cleaning of the sidewalks and streets after market hours, the use of the market property as a place for stands and boxes for hucksters and country people, and any and all other evidence in the case bearing upon this question.

In other words, if you find for the plaintiff, in determining the amount of damages you will consider all the evidence in the case and give it such weight as you think it is entitled to.

Now, gentlemen, you may retire.

Thereupon the jury retired to consider of their verdict.

The foregoing is all the evidence adduced or offered in the case and all the proceedings occurring at the trial.

47 All the foregoing proceedings were had, and all the exceptions hereinbefore mentioned were prayed, allowed, taken and noted before the jury retired to consider of their verdict.

And, thereupon, the plaintiff prayed the court and now prays the court to sign, and seal this her bill of exceptions to have the same force and effect as if each of the said exceptions were separately and severally set forth in a separate bill of exceptions; and the same is accordingly done, and the court signs and seals this bill of exceptions, to have the force and effect aforesaid, now for then, this 18 day of June, 1906.

HARRY M. CLABAUGH,
Chief Justice.

Service of copy accepted.

48 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 47, both inclusive, to be a true and correct transcript of the record, as per Rule 5 of the Court of Appeals of the District of Columbia, in cause No. 45,216, at Law, wherein Jane O'Dwyer is plaintiff, and the Northern Market Company *et al.* are defendants, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 7th day of August, A. D. 1906.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By ALF. G. BUHMAN, *Ass't Cl'k.*

Endorsed on cover: District of Columbia supreme court. No. 1715. Jane O'Dwyer, appellant, *vs.* Northern Market Company *et al.* Court of Appeals, District of Columbia. Filed Aug. 9, 1906. Henry W. Hodges, clerk.

In the Court of Appeals of the District of Columbia.

OCTOBER TERM, 1906.

JANE O'DWYER, Appellant,
vs.
NORTHERN MARKET COMPANY
AND THE
DISTRICT OF COLUMBIA,
Appellees.

No. 1715.

BRIEF ON BEHALF OF APPELLANT.

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In the Court of Appeals of the District of Columbia.

OCTOBER TERM, 1906.

JANE O'DWYER, *Appellant*,

vs.

NORTHERN MARKET COMPANY and the DISTRICT OF COLUMBIA, *Appellees.*

No. 1715.

BRIEF ON BEHALF OF APPELLANT.

This is an appeal from a judgment entered by the Supreme Court of the District of Columbia on a verdict returned by a jury in said court, said appeal being prosecuted on exceptions duly taken in the course of the trial to rulings of the justice presiding on evidence offered during said trial, and on instructions to the jury granted over appellant's objections and exception duly taken.

Statement of Facts.

Suit was brought by appellant, plaintiff below, to recover damages from the market company and the District of Columbia for personal injuries suffered in consequence of slipping and falling on some green vegetable or other refuse matter on the sidewalk of Seventh Street, be-

tween O and P Streets, the market company owning the building abutting on the sidewalk and hiring 3 feet or so of the sidewalk next the curb to country people who, with the knowledge of the District, or notice equivalent to knowledge, were authorized by the market company to use the public sidewalk as an appurtenance to the market building proper. The declaration filed on behalf of the plaintiff was framed as to two counts on the theory that this use of the sidewalk was illegal and was a nuisance, it being alleged that the market company unlawfully let out the sidewalk for hire to country people, from whom it exacted a daily tribute, and that the District permitted this illegal occupation and obstruction of the public street. Another count of the declaration was based on the theory that the market company, whose market house was situated at the corner of Seventh and O Streets, and running thence down to midway of the block towards P Street, treated the sidewalk as an approach to and part of its market, and that having so treated the same it occupied the same relation and had the same obligations with respect to its patrons, of whom the plaintiff was one, that it would have had if the accident had occurred inside the market house proper; and that the plaintiff having suffered injury by negligence of the market company in permitting the sidewalk to become filthy and slippery by reason of an accumulation of market truck thereon, was liable for the damages resulting therefrom, the liability of the District being based on its permitting such use of the sidewalk.

The evidence on behalf of the plaintiff tended to support all the averments of the declaration. It showed that the plaintiff had been for a long time a patron of the market company; that the market house extended along

Seventh Street, about midway the block, towards P Street; that the market company, with the exception of two stores occupied by McIlveen and Taylor, owned all the property on Seventh Street from O to P Streets; that for a long time prior to and on the day of the accident hucksters and others on market days occupied the sidewalk on Seventh Street, extending from O to P Streets, with the exception of so much of the sidewalk as lay in front of McIlveen and Taylor's stores, said hucksters and others placing barrels, boxes, and trays on the sidewalk for a space of 3 feet and more from the curb, and putting their fruit, vegetables, and garden truck on these stands, from which they offered them for sale to persons who might come to the market to buy; that these hucksters and others backed their wagons up wherever they could find space in front of either the market proper or the market house stores nearer P Street, and that the market master collected 10 cents a day from these hucksters; that the barrels, boxes, trays, etc., on which they rested their goods came from a small vacant lot owned by the market company, adjoining the market house building; that no attempt was made to clean said walk or keep it free from vegetable matter except after the market closed, when the market company, at varying intervals, cleaned the sidewalk and street; that complaints of the condition of the street had been made to the market company by at least one of its patrons (p. 11) during the summer of the accident and prior thereto; that on the morning of the accident the sidewalk, and especially the part on which plaintiff fell, and which was occupied by vegetable and fruit dealers, was in a very filthy and dirty condition about two hours before the accident, being partially covered with broken tomatoes, green vegetables, cabbage

leaves, and other refuse of a kind and nature similar to the produce in which the hucksters lining the sidewalk dealt; that on the morning of the accident there were quite a number of persons attending the market, and that the plaintiff while walking along on her way to market, when in front of the store occupied by one Henrietta Cohen and owned by the market company, slipped on some green vegetable matter on the sidewalk between one of these stands and the Cohen store and had a severe fall, resulting in the breaking of an arm and a severe strain of the shoulder muscles. (Trans. Rec., pp. 10-13.) The plaintiff testified that she was moving as carefully as she could in the crowd just before the accident, and that she never saw this vegetable matter until after she fell, when she found herself lying in it, and that the sidewalk was covered with vegetable and fruit refuse such as the hucksters whose stands were as near as 2½ feet to where she fell were selling (p. 10). A lease was put in evidence (p. 18) between the market company and Henrietta Cohen for the rent of the store to Mrs. Cohen, said lease having this special condition at the close thereof:

> "It is understood and agreed that country traders and teams will be allowed to occupy the space in front of said store to the curb for displaying and selling goods, and that the clerk of the market will be allowed to collect for same and shall see that the space is cleaned up after the persons and teams have left."

Mrs. Cohen testified that the accident occurred in front of her store, which she leased from the market company, and that the market company occupied the sidewalk im-

mediately in front of her place of business, and each day the market master collected a sum from the hucksters in front of her place of business. The morning of the accident, a half hour or hour before the accident, employees of these hucksters had thrown vegetables and tomatoes on the sidewalk all the way up to her door, as they had done before that summer. She had complained to these hucksters, and also to the market master about the matter (p. 12). So far as she knew no effort was made to keep the sidewalk clean during market hours.

Appellant offered in evidence certain admissions made at the former trial by Jesse Wilson, the President and Treasurer of the Market Company, whom appellant then had put on the stand as a witness, offering to prove these admissions by the stenographer who had reported the previous trial, but on objection by the market company that Mr. Wilson was in court and could be put on the stand, the court refused to permit these admissions to be proved and appellant noted an exception (p. 13).

Subsequently, appellant, after the admissions had been ruled out, put Mr. Wilson on the stand and the latter gave testimony, and explained certain parts of it and testified contrary to part of it (p. 13).

For the defendant there was introduced in evidence over the objection of the appellant that it was irrelevant and incompetent, the testimony of the market master and of five merchants doing business near the market, and whose trade was with the market dealers, and of the bailiff of the court, who lived near the market, to the effect that the street where the accident occurred always was kept in good condition. These witnesses testified that they were speaking only generally, and that they did not know what was the condition of the sidewalk in

the year 1901, or the summer of that year, except that they had never noticed any difference at all, and that it was always kept, they thought, generally in good condition (pp. 15 and 16). The plaintiff noted an exception to this entire line of testimony, and also to a refusal to limit it if admissible at all solely to the District of Columbia.

Police officers Evans, Baker, Flather and Heffner also over objection of appellant were permitted to testify that the sidewalk in question was always kept clean and in good condition, that the market people would sweep up anything to which they called the market master's attention; that they had no knowledge of one summer being different from any other summer, or as to its condition specially at any one time. The previous objections of appellant were renewed to this testimony (p. 16).

The court refused to permit one of the officers, Capt. Heffner, to testify whether he had enforced the police regulations so far as concerned this sidewalk, the regulations forbidding vendors from occupying sidewalks (p. 16).

Four colored witnesses testified thereafter for defendant to the effect that they were at the market on the day of the accident, and that the plaintiff had slipped on a banana peel which some school children who were going by to school had thrown down on the pavement only a little while before appellant fell, and that the street had been swept only a few minutes before this occurrence. (p. 17 and 18). Each of three of these witnesses on cross-examination stated positively that the children were school children from the school across the street, and one of them, that they had their school books with them. After the third witness had testified that they were school

children just out of school for recess, she, Arabella Carroll, was asked if she did not know that the accident occurred in August, and that school did not open until the last of September, whereupon she inquired: "It was August?" (p. 17). The fourth witness then testified that he had seen appellant slip on a banana skin, but he was not sure whether some school children had been along that morning or not. He testified that there were many people walking along the sidewalk at the time of the accident, and that Arabella Carroll's stand was some 40 feet away, but she could see appellant fall on a banana skin from where she was. (p. 18).

In rebuttal Mrs. Williamson, who had been immediately behind appellant, testified in denial of the statements made by these colored witnesses (p. 18).

Thereafter the court granted certain instructions asked by the plaintiff, among which was one to the effect that the use of the sidewalk for market purposes was illegal and a nuisance, and that if the appellant was injured as a result of such use the plaintiff (appellant here) was entitled to recover.

Over the objection and exception of appellant, several prayers offered by the market company were granted, which put the burden of proof upon the appellant, submitted to the jury the question whether she had been guilty of contributory negligence and directed that the market company could not be held liable if they had exercised reasonable diligence to keep the sidewalk in a reasonably safe condition, and that the market company was not liable unless the jury found the company, its servants, or licensees, were conducting a market on the sidewalk where the plaintiff fell.

Likewise, over objection and exception of appellant, there were granted prayers offered by the District of Columbia to the effect that there was no evidence of actual knowledge by the District of green vegetable matter on the place where appellant slipped; that the District was not liable unless they found appellant slipped on this green vegetable matter, and that this green vegetable matter had been there on the sidewalk so long defendant knew or should have known thereof, and that although the District permitted occupation of the sidewalk by the market company, it was not liable unless it had knowledge or the equivalent thereof of the obstruction on the sidewalk.

The jury after a charge by the judge in accordance with these instructions returned a verdict in favor of defendant (appellee here), whereupon an appeal was duly noted.

Assignments of Error.

1. That the court below erred in granting over appellant's objection Prayer No. 4 of the market company instructing the jury plaintiff could recover only on the theory the company was guilty of some negligence, and that the burden was on plaintiff of showing such negligence by a preponderance of the evidence (p. 20).

2. That the court below erred in granting over appellant's objection Prayer No. 5 of the market company that plaintiff could not recover if guilty of contributory negligence.

3. That the court below erred in granting over appellant's objection Prayer No. 6 of the market company that if the jury found the market company was conducting a market on the sidewalk, yet nevertheless their verdict

must be in favor of the company if it found the company exercised reasonable diligence under all the circumstances to keep the sidewalk where plaintiff fell in a reasonably safe condition.

4. That the court below erred in granting over appellant's objection Prayer No. 8 of the market company that the verdict must favor the company unless the jury found the company, its agents, servants or licensees were conducting a market on the sidewalk where the plaintiff fell.

5. That the court below erred in granting over appellant's objection Prayer No. 4 of the District of Columbia that there was no evidence of acutal knowledge on the part of the District of Columbia of either the alleged filthy condition of the sidewalk or of the existence at the place of the accident of the alleged green matter on which it was alleged plaintiff slipped (p. 21).

6. That the court below erred in granting over appellant's objection Prayer No. 5 of the District of Columbia that the District was not liable unless the jury found that the green matter on which plaintiff slipped had been so long on the sidewalk that the District should have obtained knowledge of the same and that the presence of green matter on the sidewalk at the point of the accident did not impute notice of such alleged condition of the sidewalk unless it had so long continued as to afford constructive notice to the District.

7. That the court below erred in granting over appellant's objection Prayer No. 6 of the District of Columbia that although it permitted occupation of part of the sidewalk by the market company it was not liable if it kept the remainder in reasonably safe condition and that it was not liable for obstruction of the sidewalk unless it

had notice of the obstruction or unless it had lasted so long that with due diligence it should have known.

8. That the court below erred in refusing to permit appellant to prove admissions made by Jesse B. Wilson, president and treasurer of the market company, at the former trial of the cause on the ground that Mr. Wilson was in court and that appellant had put Mr. Wilson on the stand at the former trial (p. 13).

9. That the court below erred in permitting Market Master William H. Covington over appellant's objection and exception, to testify in behalf of the market company as to the condition in which it had kept the sidewalks for six months prior to the accident (p. 14).

10. That the court below erred in refusing to admit testimony of Market Master Covington as to the charge made by the market company of those who occupied sikewalk space against the market building as affirmative evidence and in limiting such testimony to the witness' credibility only (p. 15).

11. That the court below erred in admitting the testimony over appellant's objection and exception of the witnesses for the market company, J. P. Ritter, Charles F. Plitt, Henry C. Jones, Somerset R. Waters and John McIlveen to the effect that the sidewalk about the market always was kept in good condition, and that they did not notice what was its condition in the summer of 1901, except that there was no difference (pp. 15 and 16).

12. That the court below erred in admitting the testimony of the witnesses for the District of Columbia, Policemen John R. Evans, Archie Baker, Colin E. Flather and James B. Heffner as to the generally good condition of the sidewalk and the general care taken (p. 16).

13. That the court below erred in refusing to limit, as requested by appellant, the testimony of Policemen Evans, Baker, Flather and Heffner, aforesaid, as evidence for the District of Columbia only, and not for the market company (p. 16).

14. That the court below erred in refusing to permit Police Captain Heffner to testify whether at the street in question he enforced the police regulations forbidding vendors to occupy the sidewalks (p. 16).

ARGUMENT.

Counsel for appellant contend that there has been a mistrial in the pending cause, and that the court below in effect converted a cause of action arising out of and resulting from a nusiance with the natural consequences flowing from the fact that the injury was occasioned by a nusiance, into a trial as to whether or not there was in effect a nuisance and whether the street market had been conducted in a reasonably safe manner, and that the jury were misled into believing that the real issue was whether or not the street had been kept in a generally good condition considering that it was a market, and not solely the question whether or not plaintiff's injury had resulted from an illegal occupation of the public street a nusiance *per se*. Counsel contend that the court below took a fundamentally erroneous view of the cause, and that this view permeated the entire trial and resulted in erroneous and irrelevant issues, to appellant's prejudice and surprise.

The market company is a strictly private corporation, organized for personal gain under a law authorizing the organization of manufacturing and mercantile companies. It is in no sense a public corporation. At the time of the accident there was no law authorizing occupation of the

public street for market purposes and the occupation which the undisputed evidence shows was beyond dispute, an illegal and unauthorized occupation, and hence a nuisance.

The fee of the streets of the City of Washington according to settled law is in the United States, and permission, except by express authority of Congress, cannot be granted lawfully for the occupation or obstruction of the streets even by the Commissioners of the District of Columbia if they should attempt to make such a grant (see District Commissioners *vs.* Washington Market Company, 6 Appeals, 34).

By Act of Congress of 1862 it is provided :

> "No open space, public reservation, street, or any public grounds in this city shall be occupied by any private person or for any private purpose whatever under a penalty of not more than fifty dollars nor less than twenty-five dollars per day for every day or part of a day any such place shall be so occupied."

And the Act of the City of Washington of 1856 declares :

> "It shall not be lawful for any person or persons to place or cause to be placed or allowed to remain any goods, wares, or merchandise, or any sign, box, barrel, or other obstruction on either the footways of any street or avenue further than four feet from the building line."

In the case of the District of Columbia *vs.* Monroe, McArthur and Mackey's Reports, page 348, it was held that this act gave an implied license to merchants and others to place wares on the public street within 4 feet of

their show windows, but that there was no authority whatever to occupy the sidewalk at any other places. The occupation of the hucksters in the present case was at the curb and not immediately next to the store. By the act of Congress, approved January 26, 1887, authorizing the District Commissioners to make police regulations for the government of the District, they were directed in paragraph 8 of said act:

> "To prohibit the deposit upon the street or sidewalks of fruit or any part thereof, or other substance or articles that might litter the same or cause injury to or impede pedestrians."

By Section 1, Article 8, of the Police Regulations of the District of Columbia, 1902 edition, it is provided:

> "No person shall throw, cast, deposit, scatter or leave in or upon any street, avenue, alley, highway, footway, parking, or other public space in the District of Columbia, any dirt, mud, ashes, gravel, sawdust, shavings, hay, straw, offal, vegetable matter. * * * That licensed venders selling from stands or push carts upon the streets or other public places shall attach to such stands or vehicles a receptacle to contain refuse matter incident to their business."

These provisions are further reinforced in Section 2 and Section 3, paragaph A, of said Articles.

When this cause previously was before the court the foregoing matters were called to attention and it was held by this court, O'Dwyer *vs.* Northern Market Company, 24 App. D. C., 87, that the occupation of this public street for market purposes was a nuisance which it was the duty of the District of Columbia to abate, and for

which, if any one was injured, the District was liable, and also the market company, which, it was held, it is not to be doubted was engaged at the time of the plaintiff's accident and for long previous thereto in conducting a market in the street—all this for its personal gain and in usurpation of public rights.

This illegal usurpation of the public streets constituted a nuisance and because thereof there was a right of action in any person who suffered special damage, as did the appellant, from this use of the public street. Being a nuisance, all that the appellant was called upon to show, certainly as against the market company, and we think under all the evidence as against the District of Columbia also, was that she had been injured as the result of slipping on something occasioned by the use for market purposes of the public sidewalk, and that it was wholly immaterial, irrelevant and incompetent for how long the refuse matter was on the sidewalk or in what condition the sidewalk had been generally kept and whether the market company did or did not use ordinary diligence to keep the sidewalk in a reasonably safe condition considering all the circumstances, and that it was devoted to market purposes. The liability of the market company was far greater than this. To hold otherwise would be to hold that by usurping the public streets for market purposes they could impose such law as might properly pertain to a lawful established market upon any persons who used the public highway. The assignments of error which we wish later to discuss severally, resulted primarily from this fundamental error as to the distinction between a nuisance beyond controversy and the ordinary case of negligence.

Dillon on Municipal Corporations, Section 657 *et seq.*, says:

> "The power of municipal corporations to establish markets and build market houses will not give an authority to build them on the public streets. Such erections are nuisances, though made by a corporation, because the street, and the entire street, is for the use of the whole people. They are nuisances when built upon a street, although sufficient space is left for the passage of vehicles and persons. Such erections, it seems, may be legalized by express act of the legislature, but unless so legalized a nuisance erected and maintained by a public corporation may be proceeded against criminally or otherwise, the same as if erected by private persons. Statutes authorizing and legitimating obstructions upon the highways which otherwise would be nuisances are strictly construed and must be closely pursued. The principle that streets and public places, or the uses thereof, speaking generally, belong to the public is one of great importance. Because they are public, whether the technical fee be in the adjoining owner, in the original proprietor, or in the municipality in trust for the public use, any unauthorized obstruction of the public enjoyment is an indictable nuisance. In this country a municipal corporation cannot license the erection or commission of a nuisance by virtue of any implied or general powers.
>
> "A building or other like structure erected on a street without the sanction of the legislature is a nuisance and the local corporate authorities cannot give a valid permission thus to occupy streets without express power of this nature conferred upon them by charter or statute. * * * A person erecting or maintaining a nuisance upon a

public street, alley, or place is liable to the adjoining owner or other person who suffers special damage therefrom."

See also Angell on Highways, Sec. 237.
Littlejohn *vs.* Cedar Keys, 15 Fla., 356.
State *vs.* Mobile, 5 Port. (Ala.), 279.
Savannah *vs.* Wilson, 49 Ga., 476.
Ketcham *vs.* Buffalo, 14 N. Y., 374.
Temp. Hall Assn. *vs.* Giles, 33 N. J., 260.

A long line of decisions beginning with Marriott's case in Maryland and ending with Cochrane *vs.* Frostburg, 8 Md., 54, has settled the liability of the District for failure to enforce the law, and its duty as to occupancy of the public streets. This court in the cases of Davis and Cissel, respectively *vs.* Thomas W. Smith and the District of Columbia, 22 App. D. C., 298, and 318 respectively likewise has determined the fundamental principles applicable to such a case.

Likewise, this court in O'Dwyer *vs.* Market Company, *supra* has ruled that the natural consequence of using a public street or place for market purposes would be that vegetable matter would get thereon. This, we think, puts the District of Columbia in exactly the same position as the market company itself, the one usurping and the other by sufferance, and with power and duty to abate permitting the illegal usurpation. Both are liable for whatever they should have foreseen, and what were the natural and probable consequences of such use of the streets.

In Milwaukee Railway Company *vs.* Kellogg, 94 U. S., 469, and Railway Company *vs.* Elliott, 149 U. S.. 266, it is held that parties will be deemed and presumed to have

contemplated consequences which were natural and probable. The appellant's injury under the circumstances was just such an injury as might have been easily expected and anticipated as a result of the illegal conversion to market purposes of a crowded public highway. This theory and view of the case the court ignored in its admission of testimony, and wherever it did in granting a prayer recognize the theory promptly negatived its action by the grant to defendants (appellees here) of contrary or misleading instructions.

Taking up the assignments of error severally :

1. The trial court erred in instructing the jury that plaintiff could recover only on the theory the company was guilty of some negligence, and that the burden of proof was on the plaintiff. The occupation of the sidewalk being either by the market company direct or an occupation which it aided and abetted, and for which it collected tolls and over which it exercised supervision, as the record admits, the company was guilty of the maintenance of a nuisance. It being a nuisance was negligence in itself, provided injury was occasioned, and it was error to instruct the jury that negligence, which obviously was predicated upon some proposition of failure to keep the sidewalk clean, was necessary to render the company liable. With respect to the burden of proof the instruction was absolutely opposed to the opinion of this court in the O'Dwyer case, *supra*, and in Market Company *vs.* Clagett, 19 App., D. C., 25. The market company having illegally converted a public street into market premises, and the plaintiff having been injured by reason of market refuse on the sidewalk or refuse that it was natural to expect would be there, the burden was upon the company of showing that it could not by the exercise

of the highest care have prevented this accident. Indeed, even the highest care would not have relieved it because no degree of care could absolve it from the consequences of the creation and maintenance of an illegal occupancy of the public streets. All that plaintiff had to show was that that nuisance had resulted to her injury, and that gave her a good cause of action. *

See Dillon on Municipal Corporations, *supra*, also the Clagett case, *supra*, to the effect that the onus is upon market companies to show that they could not have prevented an accident to a patron of the market.

2. It was error to submit to the jury at all the question of contributory negilgence on the part of the plaintiff. The record fails absolutely to show that in the slightest respect the appellant failed to exercise due and ordinary diligence and care, and there being no evidence of any negligence on her part, that matter was not a proper subject of submission to the jury. Furthermore, the prayer, even if there had been any evidence of contributory negligence, would have been improper without the qualification that the plaintiff being in the exercise of her lawful rights, had a right to presume that the market company would have kept the place clean and safely passable at all times, as was its duty. O'Dwyer *vs.* Market Company, *supra*.

3. The court in granting Prayer No. 6 of the market company to the effect that it was not liable if the jury found it exercised reasonable diligence under all the circumstances to keep the sidewalk in a reasonably safe condition, negatived entirely the prayer of the appellant to the effect that the maintenance of a market on this street was a nuisance, and that the company was liable to appellant if she had been injured as a result of use of the

* Wright vs Compton 53 Ind 337
Conklin vs Thompson 29 Barb (ny) 218
Sullivan vs Dunham 161 ny 290

public sidewalk for market purposes. The two prayers are absolutely inconsistent, and the granting of the appellee market company's prayer could not but mislead the jury and result to the prejudice of the appellant. In effect it amounted to a declaration that, considering the fact that it was used for market purposes, such diligence as would be reasonable at a market, lawfully established, to keep the place reasonably clean, was all that could be expected of the market company. This prayer has the vice throughout of applying to an absolutely illegal occupation principles of law that certainly cannot apply except where the use of the public place is lawful, and possibly not even there. To say in one prayer that the plaintiff was entitled to recover if injured because of use of the public sidewalk for market purposes, and in another that she was not entitled to recover, provided that illegal usurpation had been conducted reasonably all circumstances considered was to authorize the jury, as they evidently did, to reach the conclusion that after all there was on trial the question of the general mode of conducting the market on the sidewalk, and to warrant them in concluding that in view of the testimony of the police officers and merchants, the appellant had failed by a preponderance of the evidence to show neglect on the part of the company. Conceding the nuisance, injury consequent on the nuisance made, as stated heretofore, perfect a right of action as against the market company.

4. It was error to submit to the jury any question involving a doubt as to the fact whether the conducting of the market on the sidewalk was that of the market company. This prayer is in conflict with the language of

the court in O'Dwyer *vs.* Market Company, *supra*, wherein the court said :

> "It is not to be doubted under the testimony adduced that the market company had, and for a long time prior to the accident was, conducting a market in the street in question."

The undisputed testimony is that the market company in its leases of the stores it owned at and adjoining the place of the accident specifically reserved to hucksters the right to use the sidewalk, and the right in the market company to collect for such use; that it did collect for this use of the public street; that it kept and took care of all the trays and other appliances needed by the hucksters resorting to the market; that it exercised a supervision over them, and undertook to, and did clean up after they left. The jury should have been instructed instead that the market company was using the public sidewalk and responsible for any injury resulting from such use.

5. There was error in granting Prayer No. 4 for the District of Columbia that no actual knowledge of the condition of the sidewalk or of the existence at the place of the accident of the alleged green matter was shown. The evidence of the District's own witnesses, its police officers, shows that there was actual knowledge of the use of this sidewalk for market purposes; it is a natural and probable consequence of such use that the sidewalk at times would be in a dirty or unsafe condition, and, as said by this court in the O'Dwyer case, *supra*, the neighborhood of a market to the street was notice that unusual care should be taken to keep the streets free from vegetable incumbrances. Knowledge of a nuisance, therefore, drew to itself, so far as the District was concerned,

knowledge with respect to whatever substances might get on the sidewalk from use of it for market purposes.

6. The above remarks apply likewise to Prayer No. 5 of the District of Columbia. That prayer, furthermore, was absolutely vicious in that it limited appellant's right to recover against the District to some particular green matter, and to the presence of this particular green matter on the sidewalk sufficiently long for the law of constructive notice to apply. It eliminates entirely the duty of the District as defined in O'Dwyer *vs.* Market Company, *supra*, to take unusual care that the sufferance of a market on a sidewalk at the place of the accident should not result in injury to any person lawfully on the public highway. Under this prayer the District was absolutely absolved from law unless there was brought home to it knowledge of the presence of particular green matter on the sidewalk for such a long time that the District could have put its machinery in force and have caused the same to be removed. It furthermore is in conflict with the line of Maryland decisions heretofore referred to, to the effect that a municipality is responsible for injuries resulting from its failure to enforce its ordinances. It is in conflict furthermore with the decisions of this court in the cases of Cissel and Davis *vs.* Thomas W. Smith and the District of Columbia, *supra*, in both of which cases there was upheld a prayer which, in effect, directed a verdict in favor of the plaintiffs, because the District with power to abate the same, had permitted a nusiance in the shape of piles of lumber to be maintained by a private individual upon the public streets. The District for a long term of years, having suffered, acquiesced in, and, through its police officers, having granted its moral support to a violation of law by the market company, was, like the market company, liable without other showing than the illegal user

of the public streets for market purposes, and the injury thereby of the appellant. Even the very flimsy attempt at escape by the market company on the ground that it did not expressly authorize the hucksters to use the streets, is denied to the District, because under the ordinances, it was its duty to have prevented hucksters just the same as the market company from converting a public street into a market.

7. The foregoing general remarks with reference to the liability because the occupation was a nuisance applies to Prayer No. 6 of the District of Columbia. Furthermore, it was objectionable in that it was misleading and erroneous as inculcating in the mind of the jury the view that the whole sidewalk did not belong absolutely to the public and the United States, and that all that was essential if part of the public sidewalk was occupied for market purposes was that the remainder should be kept in a reasonably safe condition, and that the District had to have actual or constructive notice for a long time of an obstruction before it could be held in damages. Occupation of part of the sidewalk necessarily increased the congestion of the other part of the sidewalk, and attracted a crowd there and rendered it less open than otherwise would be the case for the appellant to choose a safe place for her travel of the public streets, and increased the liability to a fall from the presence of market matter thereon, either from the dealers themselves, market patrons or persons attracted to the sidewalk because of the market and the crowds.

8. The fact that the president and treasurer of the market company was in court, and that appellant could put him on the stand at the former trial did not warrant the court in refusing to permit proof of admissions made

by this officer of the market company at the former trial. So far as concerns any question as to proof *aliundi* of the office held by Mr. Wilson that cannot prevail on appeal, because had that been the ground of the objection to the evidence or of the court's rulings, it could readily have been cured, and every possible objection forestalled.

Ins. Co. *vs.* Miller, 60 Fed., 254-6.
Willey *vs.* Portsmouth, 64 N. H., 214.
Walser *vs.* Wear, 141 Mo., 443.
Everson *vs.* Mayhew, 85 Calif., 1.
Howard *vs.* Howard, 52 Kas., 469.

The matter on appeal must be treated on the same ground on which advanced at the trial court. That it was error is apparent. The proposition of the court in substance amounted to this: That although appellant in a proper case could prove admissions made out of court and not under the solemnity of an oath by an agent of the market company, yet it could not prove these admissions when made formally, under oath, and without liability to error, inasmuch as they had been stenographically reported.

In Lorenzana *vs.* Camarillo, 45 California, it was held that on the second trial of a cause plaintiff may introduce the evidence of defendant given on a former trial, even though defendant is present in court.

See also Robinson *vs.* Stewart, 68 Maine, 61.
McAndrews *vs.* Santee, 57 Barbour (N. Y.) 193, and
White *vs.* Summers, 13 Ill. App., 444.
Kurtzmyer *vs.* Ennis, 27 N. J. L., 371.

This error was not cured by the fact that appellant being unable to prove the admissions according to his

lawful right subsequently placed Mr. Wilson on the stand. Appellant was entitled to Mr. Wilson's admissions qua admissions, and without being subject to the embarrassment to which he was subjected of proving that Mr. Wilson at the former trial had testified differently from at the second trial, and to explanations designed by the president of the market company to relieve the damaging force of the admissions he had originally made, and subsequently regretted, and reconsidered when again put on the stand.

8. Assignments of error 9, 11, 12 and 13 will be treated together. They all involve the fundamental error hereinbefore referred to of treating this case the same as would be a case of lawful occupancy. Being a nuisance the market company was liable for maintenance of the nuisance, and the District of Columbia for not abating the same when it was its duty so to do. In any aspect of the case the evidence was inadmissible as respects the market company. Having maintained a nuisance, it was liable therefor to any persons injured as a result of maintenance of this nuisance. Evidence as to what had been the condition of the sidewalk some months before was wholly irrelevant and immaterial. The issue was not one that might have been proper had the trial been on the question whether or not the market was in fact a nuisance because of the mode in which it was conducted. It being conducted on the public street in violation of law, it was *per se* a nuisance, and all the evidence that was admissible was only such as bore directly upon its condition on the day in question, and immediately prior thereto; with complaints, as by Mrs. Roman to the market master, admissible as tending to show a

Klepp v. New Eng. Co. 3 [illegible] 16 [illegible] aff 534
Baal v. 3 [illegible] 15 [illegible] 304
Curtis v. 5 [illegible] 34 aff [illegible] NY 491
Affirmed in 105 NY 610

state of things that might cause injury such as happened brought home to the company. Complaints where nearly related to an accident are generally admissible in all personal injury cases. Furthermore, the entire evidence offered by the market company and the District of merchants and policemen was inadmissible inasmuch as the witnesses confessedly knew nothing whatever with respect to the occasion that was before the court or the summer in question and it has long been settled that evidence of general reputation or of conditions at other times than the one in controversy is not admissible in negligence cases. The witnesses were but speaking to reputation or guessing. It would be idle speculation to say from it what was the condition at the time of the accident. They had no knowledge even as to what was the condition in the particular summer when the accident occurred. All that they could say was that they thought it always was kept in good condition. Their testimony doubtless was truthful, but, at the same time, it was irrelevant, and it was predicated furthermore upon what in the opinion of these men who had business with the market and treated it as a lawful establishment thought was reasonable under the condition and circumstance that it was a market. Throughout the record discloses that appellant objected to its admissibility as to either defendant, and then, failing therein, to its admissibility so far as concerned the market company. Clearly, in no view of the case, was it proper evidence as to a violator of the law. The issue was not whether or not the market company did use reasonable diligence to keep its nuisance within reasonably safe bounds, but was simply: Had the nuisance

been maintained and had the appellant thereby been injured? So far as concerns the fact that Mrs. Roman testified as to its condition in the summer before the accident that could not, neither defendant having objected thereto, conceding its inadmissibility, warrant the admission of improper testimony subsequently of either defendant over a proper and seasonably raised objection on the part of the appellant.

Dolson *vs.* De Ganahl, 70 Tex., 620.
Redman *vs.* Piersol, 39 Mo., App., 173.
Lake Roland R. Co. *vs.* Weir, 86 Md., 273.
Carr *vs.* West End R. Co., 163 Mass., 360.

Throughout the court seems we think not to have grasped the case and to have gone on the theory in admitting testimony of merchants, policemen, and others, and in its remarks to counsel (p. 14), that it could let in evidence, competent or incompetent, relevant or irrelevant, and separate it afterwards. But, such a course is by reason and authority improper and makes it impossible to say whether legal or illegal evidence affected the result announced by the jury. It was reversible error.

National Banks *vs.* Anderson, 32 S. C., 538.
McCurry *vs.* Hooper, 12 Ala., 823.
Wright *vs.* Reusens, 133 N. Y., 298-306.
Martin *vs.* Lloyd, 94 Calif., 195.

Instructions could not cure the mass of evidence introduced through such a number of witnesses by the two defendants, especially such conflicting and confusing instructions as were given.

Even in ordinary cases, evidence of general condition is not competent.

Temperance Hall Assn. *vs.* Giles, 33 N. J. L., 620.
Bauer *vs.* Indianapolis, 99 Ind., 56.
Burgess *vs.* Davis Sulphur Ore Company, 165 Mass., 71.
Bliss *vs.* Wilbraham, 8 Allen (Mass). 564.

10. The Court committed error in refusing to admit affirmative testimony as to the charge made by the market company of those who occupied sidewalk space against the market building (assignments of error No. 10) there being raised a question of the market company's maintenance or liability for such use as was made of the sidewalk and a denial by it that it was a party to the occupancy. This evidence should be admitted as showing that the market company did control the public sidewalk and not only that, but that it farmed out places of privilege at extra rates of rental to persons who came there to sell their wares.

11. The 14th assignment of error is well taken because the District being liable under the line of decisions in Maryland from Marriott's case to the Frostburg case in 81 Md. it was competent to prove that as to this particular place no attempt whatever was made to enforce the law and the police regulations. It was directly in point in establishing notice to the District and its delinquency. The District should and does act in such matters only through its police officers, so that it was competent to prove by these agents entrusted with this duty that they not only tolerated, but acquiesced in and approved the nuisance and violation of law.

In conclusion appellant reiterates that there has been a mistrial in this instance upon false issues, and that the

fundamental error of the court permeated the whole trial and caused an adverse decision to appellant because of a belief on the jury's part warranted by the course pursued by the court inadvertently in the trial that they were trying the general question of the manner in which the market company conducted its occupation of the public sidewalk. Appellant could have overthrown, she believes, this evidence that the market company ever did as a matter of fact conduct its market in the public streets in a cleanly manner, but such was not the issue, and no preparation to meet such an issue was or should have been made by appellant.

Respectfully submitted,

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Attorneys for Appellant.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1906.

No. 1715.

JANE O'DWYER, APPELLANT,

vs.

NORTHERN MARKET COMPANY AND THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF APPELLEE NORTHERN MARKET COMPANY.

ARTHUR PETER,
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JANE O'DWYER, APPELLANT,

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NORTHERN MARKET COMPANY AND THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF APPELLEE NORTHERN MARKET COMPANY.

I.

Statement of Case.

The appellant brought suit against both appellees to recover damages for personal injuries alleged to have occurred through the negligence of the Market Company and the District of Columbia. The declaration is in three counts. The first count charges that on August 26, 1901, the Market Company let out for hire certain stalls in its market building at the corner of 7th and O streets northwest, and also space on the sidewalk of 7th street to persons selling fruit and veg-

etables; that it was the duty of the Market Company to keep the streets free from obstruction and safe for pedestrians, and to refrain from unlawfully hiring the public sidewalks; that the Market Company unlawfully rented the public street to vendors of vegetables and fruits, and that by reason of the negligence of the company in permitting the street to be filled with refuse matter, the pavement was rendered slippery, and while the plaintiff was walking on the street at the *invitation of the defendant* (without stating which defendant) she slipped and fell to the ground, sustaining the injuries to recover damages for which the suit was brought.

The second count charges that the company was engaged in maintaining certain places on the sidewalk to which vendors of produce were invited to come, and that it was the duty of the company to keep the sidewalk in a safe condition and free from refuse matter, but that it permitted the sidewalk to be in an unsafe condition *by reason of peelings and vegetable matter,* by reason of which the plaintiff slipped and fell.

The third count charges that it was the duty of the Market Company to make no unlawful use of the streets and to do no act which would cause an obstruction on the sidewalk, or that would cause stands, barrels, produce, or vegetable matter to be on the street, but that the company, in violation of its duty, created or permitted the deposit of unlawful obstructions, of barrels and refuse matter, in consequence of which illegal obstruction and occupation the plaintiff was injured.

The third count then proceeds to state that the company made the sidewalk an adjunct to its market-house, and permitted farmers to occupy the sidewalk or to put barrels on the sidewalk with knowledge that the refuse matter might be deposited on the street; that the company collected a daily fee of ten cents from each of the farmers; that by reason of these matters the sidewalk was made unsafe by the presence of vegetable matter, and in consequence thereof the plaintiff slipped and fell to the ground, sustaining injuries.

The proof was as follows:

(1.) The testimony of the plaintiff, who stated that for many years she had been dealing at the market of the defendant company on the west side of 7th street, between O and P streets, going there three or four times in each week; that on August 6, 1901, while on her way to do some marketing, she slipped and fell on some vegetable matter on the sidewalk of 7th street. Nearly the entire sidewalk from O to P streets was occupied by country people and hucksters selling vegetables and fruit. They occupied by their stands and produce about four feet of the sidewalk, which was about twelve feet wide. The stands and trays on which the dealers placed their produce when not in use were stored on the property of the Market Company, which collected each market day ten cents from the dealers who stood on the sidewalk. At the point where she fell the sidewalk was in a very dirty condition, strewn all over with vegetable matter. She could not state how long this vegetable matter had been on the sidewalk that morning. The sidewalk was cleaned and made neat and tidy each day after market was over, but prior to the accident she had never seen any effort made to keep it clean during market hours.

(2.) Katherine S. Roman testified that during the summer, prior to the accident to the plaintiff, the sidewalk on 7th street was in a bad condition always, with vegetable peelings and refuse from the people who kept stands on the sidewalk. She complained to the market master about it several times, and told him that he would have to have it cleaned. She was afraid to walk on the sidewalk, and the odor from the vegetables was very bad. On the morning of the accident she went to market about eight o'clock, and observed that at the time the sidewalk was in a miserable condition, and that she could see peelings and vegetable leaves around, just the same as she had been seeing it for a considerable time. She had never observed any effort to clean the sidewalk during market

hours. On the morning of the accident the whole sidewalk was strewn with refuse. She further stated that conditions had been bad for ten years.

(3.) Henrietta Cohen testified that she leased a store from the Market Company on 7th street, paying rent therefor to the market master. Each day the market master collected money from the hucksters in front of her place. On the morning of the accident vegetables and tomatoes had been thrown on the sidewalk all the way to her door by persons who worked for the hucksters. She had complained to them, and a half hour later the plaintiff fell. The Market Company made no effort to keep the place clean during market hours, but did clean it when market was over, employing two men for the purpose.

(4.) Fannie Williamson testified that at the time of the accident she was immediately behind the plaintiff; picked her up. The dealers on the sidewalk there sold green stuff, potatoes and other produce that was in season. When the plaintiff fell the sidewalk was very dirty with cleanings, looking like spinach cleanings and kale, scattered along the sidewalk. During the summer preceding the accident the sidewalk was kept pretty dirty. The plaintiff slipped on something green, which looked like dirty peelings from vegetables. At the time the plaintiff was walking steadily and all at once her foot slipped and she fell on her arm.

(5.) The plaintiff then endeavored to offer in evidence the stenographic report of the deposition of a witness, Jesse B. Wilson, who testified at a former trial of this case; to which objection was made and sustained, but the plaintiff thereupon put Mr. Wilson himself upon the stand, and his testimony appears at page 13 of the record. After having examined Mr. Wilson at some length, counsel for the appellant undertook to contradict him by reference to his testimony at the former trial; to which the defendants ob-

jected; but afterward counsel for the defendants withdrew their objection and allowed the witness to relate what he had testified to at the former trial.

This was all the evidence offered by the appellant, and thereupon appellees, defendants in the court below, made the following proof:

(1.) Mr. Covington, market master of the company, testified that the sidewalk was always kept clean; that he had his men clean the sidewalks and gave them instructions to go, and saw them go out and clean up, if there was anything on the sidewalk. He said the company charged hucksters ten cents a day for storing their stands on the market property. If they did not want to store their stands there from one market day to another, after market was over, they did not have to pay anything. On Saturdays he would collect fifteen cents, and on other days ten cents from the hucksters for storing their stands.

(2.) Mr. Ritter, a merchant in the neighborhood, and a large number of other merchants in that section, a number of police officers, and others testified that at all times the sidewalk was kept perfectly clean, and this all before the day of the accident to the plaintiff.

(3.) Herbert Richardson testified that he and another man named Gray and a boy kept the market and the sidewalks inside the building and outside clean, going over them with a broom two or three times a day.

(4.) Taylor Green testified that he was at market on the day plaintiff fell, talking to a friend. He said the plaintiff slipped on a banana peel, which some school children had thrown down. A colored man with a broom had gone along not over five or ten minutes before the accident, sweeping off the pavement.

(5.) Byron Webb testified that he was at the market on the day of the accident, and saw some boys come along eating bananas and throwing the skins down. About fifteen or twenty minutes after this plaintiff slipped on a banana skin and fell down.

(6.) Arabella Carroll testified that she saw appellant fall. There was nothing on the street at the point of the accident except this banana skin. One of the company's employees had been around and swept the sidewalk off just before the accident happened.

(7.) Charles H. Peters testified that he saw Mrs. O'Dwyer slip on a banana peel, and that the street had been swept off just before the accident.

(8.) In rebuttal Mrs. O'Dwyer stated that she could not say that it was not a green banana skin that she fell on. It may have been so.

This was all the evidence in the case, and thereupon the case was submitted to the jury, and the verdict was in favor of both defendants, and upon that verdict judgment was entered against the plaintiff, and from that judgment the present appeal is taken.

II.

ARGUMENT.

This case was decided once before by this court, and its opinion will be found in 24th Appeal Cases D. C., at page 81. At the former trial the case was taken from the jury by the trial court at the close of the plaintiff's evidence, and the Court of Appeals had only in the record before them at that time the testimony of the plaintiff and her witnesses, which

is substantially the same as is contained in the present record, and the law that will govern the disposition of the present case has been thoroughly settled by the opinion of this court in that case.

The principles announced by the court in that case are to the effect that where the District of Columbia permits a street or sidewalk to be used for market purposes it is the duty of the municipality to see that the streets and sidewalks are kept in a reasonably safe condition for pedestrians, and that if notice of a dangerous condition of the sidewalk by reason of being covered with refuse matter is brought home to the District of Columbia, it would be liable for any injuries caused to persons slipping on the pavement.

The court further held that where a market company, without authority to occupy the streets and sidewalks, invited hucksters and others to occupy them, and collected compensation from them for their use of the streets and sidewalks, the occupation of the hucksters or dealers would be the occupation of the company, and the company would be liable for any nuisance perpetrated by such dealers by throwing refuse matter on the sidewalks.

We assume in the present case that these principles must govern the disposition of this case on this appeal.

The case was sent back by the Court of Appeals to the Supreme Court of the District of Columbia for retrial upon the two questions of fact just suggested, and the only questions before the court on the present appeal are upon the exceptions by the appellant to the admission and exclusion of evidence and to the granting and refusal of the prayers submitted by the several parties, and the exceptions to certain portions of the general charge. At the time of writing the present brief we have not been furnished with an assignment of errors on behalf of the appellant, and we are not, therefore, advised as to what exceptions the appellant relies upon. We will therefore be compelled to take up the exceptions appearing in the record *seriatim*.

(1.) The first exception appears at page 13 of the record. It was sought to introduce the stenographic report of a witness who appeared at a former trial of the case, namely, Jesse B. Wilson, and without any preliminary proof whatever as to the authority of the witness to make any admissions that would be binding upon the Market Company, or without any proof whatever as to his connection, official or otherwise, with the company, a stenographic deposition was bodily offered in evidence, the theory being, as we presume, to show that it was binding upon the Market Company as an admission of one of the company's officers against interest. The court very properly excluded the offer.

The admissions against interest of any party to a litigation, whether made in court or not, under oath or otherwise, of course are always admissible against him if such admissions are material and germane to the matter under investigation; but in this particular instance the witness Wilson is not a party to the record, and his admissions bind nobody, unless it can be shown by independent proof that he was an official of the company, authorized to bind it by his admissions—a fact which was not sought to be established in the present case.

Counsel for the appellant, however, at this stage of the trial proceeded to put the living witness himself upon the stand, who furnished all the information that he desired and proved the very things upon which the appellant relied. In his offer, appearing at the top of page 13 of the record, counsel for the appellant stated that he expected to prove that at the time of the accident and at the time of the trial the witness Wilson had admitted that some one for the Market Company collected ten cents a day from the hucksters who occupied the sidewalk. That fact was proven beyond any sort of question at the trial; the appellee The Northern Market Company had freely conceded it there and concedes it here, so that the appellant had every benefit of the evi-

dence or admissions which she says were excluded and of which she now complains.

(2.) The next exception appears on page 14 of the record. The witness Jesse B. Wilson was asked on cross-examination by counsel for the Northern Market Company to state from his own observation the condition of the sidewalk in front of the market building on Seventh street immediately before the accident—six months before the accident. The appellant objected to the question; the objection was overruled and exception noted. Thereupon the witness proceeded to answer the question by saying that he did not know what the condition was. It cannot be seriously argued in this court that the appellant has been in anywise injured by the ruling, even assuming that it was erroneous. Why such an exception was incorporated into the bill of exceptions is past comprehension. The whole burden of the claim of the plaintiff in the court below was that before the accident the premises were allowed to be in an unsafe and dangerous condition by reason of the presence upon it of refuse vegetable matter.

The witness Roman, called on behalf of the plaintiff, testified that this condition had existed for a considerable time (Rec., p. 11). The witness Mrs. Fannie Williamson (Rec., p. 12) testified that the dirty condition of the sidewalk had existed during the summer prior to the accident, and so the other witnesses called by the plaintiff. If these conditions had not existed before the accident, the plaintiff would have had no cause of action—certainly no cause of action against the District of Columbia—and if it was competent for her to prove that before the accident, why was it not competent for the defendants to disprove such a condition of affairs by asking the condition in which its sidewalk was kept immediately before the accident. We submit this alleged error is too trivial for further discussion.

(3.) The next exception appears immediately below the middle of page 14, is exactly the same as the preceding one, and needs no further comment.

(4.) The next exception appears about the middle of page 15, during the examination of the witness Covington. He was asked what the Market Company charged persons who occupied the sidewalk with their stands close against the market building. The court limited the question merely as to the witness's credibility, and the plaintiff's counsel noted an exception. The fact was testified to that the Market Company did make a charge for persons who occupied stands close to the building, and it is difficult to perceive how the plaintiff was injured by the court's ruling, that the evidence must be limited in its effect to the credibility of the witness. The presence of market stands or trays close to the building line and many feet away from where the accident happened would have no effect one way or the other upon the plaintiff's case. The evidence was entirely irrelevant and immaterial, but was nevertheless admitted. If the plaintiff sought to prove by this evidence that the Market Company rented space on the public sidewalk, that fact was abundantly proved by other testimony. The witness Covington himself stated that the Market Company charged people with stands on the sidewalk against the building $1.50 per month.

(5.) The next exception appears at the top of page 16. It does not appear from the transcript to what particular ruling of the court the appellant objected, unless it be that any testimony as to the condition of the sidewalk during the summer of 1901, preceding the accident, was inadmissible on behalf of the Market Company. This exception is the same as the preceding one, and, as before stated, the whole theory of the plaintiff's case is that before the accident the Market Company kept the street in a filthy condition. If that was the complaint, and the only complaint, why was it

not entirely competent for the Market Company to show as a matter of fact that such a condition did not exist before the accident?

(6.) The sixth exception appears below the middle of page 16, is in line with the exception heretofore referred to, and relates to the testimony of certain witnesses as to the condition of the sidewalk immediately before the accident.

(7.) The next exception appears toward the bottom of page 16, and was taken during the cross-examination of witness Heffner. He is referred to in the record as Captain James B. Heffner. He was asked on cross-examination if he had enforced on this street the Police Regulations forbidding vendors to occupy the sidewalk. It does not appear that Heffner was an officer of the law or what authority, if any, he had to enforce any Police Regulations. It does not appear what effect the failure of an officer of the law, if he was one, to enforce a municipal regulation would have upon a controversy between two individuals. We submit the exception is wholly without merit.

There were no other exceptions noted to the admission or exclusion of evidence; and thereupon the plaintiff proceeded to offer six requests for instruction, every one of which were granted without reservation or modification and without objection on the part of either of the defendants.

Taking up now the prayers granted on behalf of the Northern Market Company to which exceptions were taken, it is scarcely necessary to more than quote the prayers granted. Prayers four, five, six and eight of the Northern Market Company were granted and exceptions duly noted.

(8.) Prayer four reads as follows:

"The jury are instructed that the plaintiff in this action can only recover against the Market Company upon the theory that said company were guilty of some negligence,

and the burden is upon the plaintiff to show by a preponderance of the evidence that said company were guilty of such negligence."

The declaration alleges (Rec., p. 2) that it was "through the carelessness and negligence on the part of the defendant, The Market Company, in permitting said sidewalk or sidewalks to become in an unsafe condition, &c.," that the accident happened.

The second count also alleges a violation of duty on the part of the Market Company in not keeping the streets in a safe and clean condition, and that as a result the accident happened, and this count also alleges that vegetable matter was negligently allowed to remain on the sidewalk.

The third count also alleges that vegetable matter and refuse were carelessly permitted to remain on the sidewalk.

It will not be contended for a moment that the Market Company, or any of its officers or agents, wilfully did the plaintiff an injury, and if the Market Company was responsible at all, it was on the theory that they negligently and improperly made a wrongful use of the public streets.

(9.) The fifth prayer granted on behalf of the Market Company reads as follows:

"It was the duty of the plaintiff in walking along the street in front of the Market Company's premises to use due and reasonable care for her own safety, and if the jury find from all the evidence that the accident complained of was caused in whole or in part by inattention or negligence on the part of the plaintiff herself, such as a reasonably prudent person would not be guilty of, then the verdict should be for the defendants."

This, we submit, is a reasonably accurate statement of the law of contributory negligence. This accident happened in broad daylight, on a clear day, and to a person of mature years. It happened to a person who had frequently been in the habit of traversing before the accident the street on which

she fell and who was entirely familiar with the conditions that existed at that place. She knew that the Market Company was doing business in this locality, and must have known that a certain amount of drippings and vegetable matter is always in the neighborhood of a public market. Certainly it was for the jury to say whether or not her own heedlessness did not contribute to the injury complained of.

(10.) The sixth prayer is to the effect that there could be no recovery against the defendant, the Market Company, unless they failed to exercise reasonable diligence to keep the sidewalk where the plaintiff fell in a reasonably safe condition, and that the accident to the plaintiff was caused by its failure so to do. In other words, if the Market Company were making unlawful use of the sidewalk, and in so doing caused the same to be littered with vegetable matter, in consequence of which the plaintiff fell and was injured, then there might be recovery against the Market Company, but otherewise not.

(11.) The eighth prayer of the Market Company is as follows:

"The jury are instructed that their verdict must be for the defendant, The Northern Market Company, unless they find that the said defendant, its agents, servants or licensees were conducting or maintaining a market or place of business on the sidewalk or street where the plaintiff fell."

If the hucksters or farmers who occupied the sidewalk and street at this point were there without the Market Company's permission, invitation, or acquiescence, but were permitted to remain there by any other person or corporation, there would, of course, be no connection between the Market Company and such illegal occupation, and as against the Market Company at least there could be no recovery.

In addition to all the foregoing, in the court's general charge to the jury the substance of all these prayers was

repeated and emphasized, and no exception of any kind was taken by the plaintiff, and under the decisions of this court the plaintiff has waived any exception that she might have availed herself of otherwise.

We have not discussed the alleged errors contained in the prayers granted on behalf of the appellee The District of Columbia, as we can see that they have no relation to the Market Company and do not affect in any manner the liability of that company or the exceptions taken to the rulings made in its favor.

We refer the court to the authorities cited in the former brief filed by the appellee The Market Company, which we feel need not be repeated here.

We respectfully submit that the judgment of the court below was correct, and that such judgment should be affirmed.

ARTHUR PETER,
M. J. COLBERT,
Attorneys for Appellee The Northern Market Company.

COURT OF APPEALS, DISTRICT OF COLUMBIA

OCTOBER TERM, 1906

No. 1715

JANE O'DWYER, APPELLANT

v.

NORTHERN MARKET COMPANY AND THE DISTRICT OF COLUMBIA, APPELLEES

BRIEF ON BEHALF OF THE DISTRICT OF COLUMBIA

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BRIEF ON BEHALF OF THE DISTRICT OF COLUMBIA

I

STATEMENT OF THE CASE

Jane O'Dwyer, plaintiff below and appellant here, brought suit against the Northern Market Company and the District of Columbia, appellees here, for damages for personal injuries received from a fall on the west side of Seventh Street

west, between O and P Streets north, which fall was occasioned by the alleged slippery and dangerous condition of the sidewalk, due to the alleged accumulation of dirt, refuse, etc., negligently permitted by one or both of the defendants.

On the first trial the judge presiding directed a verdict for the defendants at the close of the evidence on behalf of the plaintiff, and that ruling was reviewed by this Court in O'Dwyer v. Market Company, 24 App. D. C., 81. The law of the case was settled by that decision and the cause returned to the lower court for a second trial to determine the facts in accordance with that opinion. This has been done by another court and jury, and this present appeal is for alleged errors occurring in the progress of that trial which resulted in a second verdict for the defendants.

II

ARGUMENT

This Court has very clearly indicated in its opinion that the question as far as the District is concerned in this case is whether the sidewalks were in reasonably safe condition for pedestrians to pass thereon after the exercise of usual care to keep the streets in the neighborhood of the market free from the encumbrances of vegetable or other matter which is a source of danger to those having occasion to use the streets.

The very questions which this Court considered the plaintiff had put in issue by her evidence were submitted to the jury for their determination on the testimony of both plaintiff and defendants.

Her claim that the part of the sidewalk was kept habitually in so filthy and dangerous a condition as to be a constant menace to the public and eventually to have caused her accident was submitted to the jury, who found against her on the facts in respect to this claim.

Her claim that the sidewalk was constantly in the same obstructed condition was submitted to the jury, who found against her on the facts in respect to this claim.

Her claim that the accident was due to a constant obstructed condition of the sidewalk was disputed by evidence of witnesses whose testimony tended to prove that her fall was due to slipping on a banana peel thrown down by children on a place swept by an employee of the market not over five or ten minutes before the accident. (Witnesses Green, Webb, Carroll, Peters, pp. 17-18.) If the jury believed this evidence there was no such long continuance of the condition as to cause constructive notice to the District. In every event, however, all these questions of fact were submitted to the jury who by their verdict have determined that no liability on any theory advanced by the evidence of the plaintiff existed as to either defendant.

This court has specifically said in its former opinion, "If the facts are as here testified—and it is for the jury to determine the value of the testimony"—the municipality would not be exempt.

The jury in this case have determined the facts were not as testified by the witnesses for the plaintiff either in the first trial, where only her witnesses had been heard, or in the second trial, where the evidence on her part was the same, but was controverted by the evidence of the defendants.

At the writing of this brief counsel have not yet been advised by appellant's attorney what exceptions he proposes to assign and urge as error which fact makes it necessary to consider every exception noted which may affect the defendant, District of Columbia.

The exception to Johnson's testimony (pp. 12-13) is directed to the refusal of the trial judge to permit the plaintiff to introduce the stenographic report of the testimony of a witness for the plaintiff at the former trial, then living and present in court under the plaintiff's summons, instead of placing the witness himself on the stand. This testimony

was intended to bind the market company only, and together with the determination of the exception to the testimony to the same witness, Wilson, when on the stand (p. 13) can only affect the rights of the defendant market company, but, if error, seems to be cured in the examination itself, for the objection was subsequently withdrawn and plaintiff's counsel asked the questions desired by him at the time of the exception.

The exception to Wilson's testimony (p. 14) is to the asking and answering of a question to which the witness replied, "I do not know," and the exception is only urged as to the Market Company, counsel conceding the question proper as to the District, both at this asking and exception and in subsequent exception to Covington's testimony. (P. 14.)

The first exception to Covington's testimony (p. 15), about no difference in cleaning on different days, affected the Market Company only, but in view of the fact that the plaintiff, by her own witness, Mrs. Roman, had put in issue the condition of this sidewalk for ten years (p. 12), testimony on behalf of the defendants about different days the summer of the accident, and testimony that there was no difference on different days, would seem competent and relevant to the issue which the plaintiff herself has made.

The second exception to Covington's testimony (p. 15), having reference only to the liability of the Market Company, does not affect the District.

The exception (p. 16) in the progress of Ritter's testimony concedes the evidence admissible as to the District of Columbia, but seeks to limit this line of testimony to the summer of 1901 only. In this connection it has already been noted that one witness of the plaintiff, Mrs. Roman, had covered a period of ten years up to and including the summer of 1901 (p. 12). It should further be noted that the plaintiff herself (p. 11) and her witnesses, Mrs. Cohen (p. 12) and Mrs. Williamson (p. 12) all testified as to custom prior and since the accident, and a portion of their testimony

was certainly of a general nature and not confined to the particular summer in question. This same objection was repeated and again urged in respect to the defendant's witnesses—Plitt, Jones, Waters, McIlvane, Joyce, Evans, Baker, Flather, and Heffner.

The testimony of these nine witnesses, including as they did business men located near the market and police officers who regarded the market as one of the most important sections on their district, was opposed to that of plaintiff herself, Mrs. Roman, Mrs. Cohen, and Mrs. Williamson on the question as to the condition in which the sidewalk was kept. Under the circumstances it appears entirely beyond any reasonable view of the law to expect this Court to award a new trial as to the District of Columbia because of these exceptions, waived by counsel as to the defendant District of Columbia, as is clearly shown by the form in which the exceptions are noted. If the form does not waive the exceptions as to the defendant, District of Columbia, yet the testimony is clearly relevant and material, for the burden is on the plaintiff herein to establish the negligence of the defendant, and the conditions as testified to by these witnesses plainly bear on the question of constructive notice in a case where it is conceded the municipality had no actual notice. The evidence also is corroborative of the witnesses Richardson, Green, Webb, Carroll, and Peters (pp. 16-17), who account for the accident itself by an unusual and sudden condition for which the municipality could in nowise be liable.

There would seem to be no question as to the admissibility of this evidence on general principles. Mr. Wigmore, in his treatise on Evidence (volume I, section 437), in speaking of external events, causes, and conditions as evidencing the existence of the condition at the time of the accident from prior or subsequent existence, states near the conclusion of the paragraph that they and the time covered by them are matters to be left entirely to the trial court's dis-

cretion, and there certainly was no abuse of that discretion in this instance.

The prayers of the plaintiff were allowed without exception, and the prayers of the defendant, Market Company, as excepted to, will doubtless be discussed in its brief, which leaves only the three prayers granted at the instance of the defendant District of Columbia for consideration here.

The first prayer granted was—

> "IV. The jury are instructed that there is no evidence in this case of actual knowledge by the defendant, the District of Columbia, of either the alleged filthy condition of the sidewalk at the place of the accident or of the existence and location at that point of the alleged green vegetable matter on which it is alleged the plaintiff slipped and fell." (P. 21.)

It was conceded by the plaintiff and her witnesses that no complaint had ever been made to the District of Columbia in any manner, and the judge in his charge clearly defined the difference between actual notice and constructive notice, and no evidence had been offered in this case of actual notice.

The next prayer granted was—

> "V. The jury are instructed that the defendant, the District of Columbia, is not liable in this case, unless they shall find the green vegetable matter on which the plaintiff says she slipped, if they find she did so slip, had been so long on the sidewalk that said defendant, in the exercise of reasonable care and caution, should have obtained knowledge of the same. And in this connection the jury are instructed that the law does not require impossibilities of any person, either natural or artificial, and the presence of green vegetable matter on the sidewalk at the point indicated in the evidence does not of itself impute notice to the defendant, the District

of Columbia, unless such alleged conditions on the sidewalk had so long continued as to afford constructive notice to said defendant." (P. 21.)

This prayer is a common statement of the law of constructive notice if the jury found the plaintiff slipped on green vegetable matter, and plainly makes the municipality liable if the condition and obstruction had continued long enough to afford notice in law to the defendant.

The next prayer granted was—

"VI. The jury are instructed that it was the duty of the defendant, District of Columbia, although it permitted the occupation of a part of the sidewalk by the defendant Market Company, to keep the remainder of said sidewalk in reasonably safe condition for the use of pedestrians and for obstruction on said sidewalk not caused by itself or its own agents or employes, said defendant, District of Columbia, is not liable, unless it had notice of the obstruction, or unless the obstruction had lasted so long and under such circumstances that, with due diligence, it should have known of its existence."

This is a statement of the law as already laid down by this Court in its former decision in this case, and states with reasonable precision the duty of the municipality.

None of these instructions were read to the jury by the Court in the progress of its charge, but were all given as explained and amplified in the charge itself. A careful reading of that charge in connection with the prayers reveals no error, and the judgment of the court below, it is respectfully submitted, should be affirmed.

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